Law of Defamation

Some Aspects

LAW OF DEFAMATION: SOME ASPECTS

AUSTRALIA
The Law Book Company Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Toronto

NEW ZEALAND
Sweet & Maxwell (N.Z.) Ltd.
Auckland

PAKISTAN
Pakistan Law House
Karachi

SINGAPORE, MALAYSIA, INDONESIA & BRUNEI
Malayan Law Journal (Pte) Ltd.
Singapore : Kuala Lumpur

U.K.
Sweet & Maxwell Ltd.
London

Law of Defamation : Some Aspects

Under the joint auspices of
The Press Council of India
&
The Indian Law Institute

Prepared by
P. M. Bakshi

1986
N.M. Tripathi Private Ltd.
Bombay

Edition 1986

Printed by Giani Press, 107/52, East Azad Nagar, Delhi-110051
and published by Justice V.S. Deshpande, Honorary Executive Chairman,
for the Indian Law Institute, New Delhi

Foreword

THE LAW of defamation is one of great importance for the press. The present study which has been very carefully done by P.M. Bakshi for the Press Council in collaboration with the Indian Law Institute, New Delhi deals more specifically with thorny questions which arise when freedom of expression comes into conflict with individual rights.

There has been no codification on the subject of defamation apart from the relevant provisions in the Indian Penal Code which relate to punishment for a defamatory statement as a crime. Libellous imputation may further involve the violation of individual privacy which *per se* is not actionable as a tort. Although the legal position is very similar to ours in the United Kingdom, infringement of privacy has developed as a tort in most of the American states.

So far as the press is concerned, there may be publication about a government servant which may damage his reputation. It may sometimes not be true, but a claim may be made that such publication was in public interest. In the United States, the constitutional decisions of the Supreme Court have brought about a revolutionary change in the law there by placing strict standard limits on the circumstances under which public officials can recover damages for the publication of defamatory statements. These decisions affect the libel law not only against public officials but also against others including public figures.

Although libel actions in India are not in terms of statistics as numerous as in the United States or in the United Kingdom, the present study is meant for suggesting removal of a number of anomalies and liberalising the defamation law keeping in view the constitutional rights conferred on freedom of expression and the reasonable restrictions that can be placed on it. The number of matters which were brought before the Press Council during the last few years in addition to matters relating to character-assassination and invasion of privacy has been fairly large. In the year 1984 alone out of 71 adjudications under section 14 of the Press Council Act 1978, 44 decisions fell under the category of press and defamation. Certain difficulties were experienced on account of the fact that truth alone can be a good defence in case of a civil action; whereas truth together with public interest must exist to justify a publication which is of a libellous nature in proceedings under the Indian Penal Code. When it comes to the question of furnishing evidence of truthfulness, the newspapers often find it difficult to produce any material owing to another well-known principle that there should be no disclosure of sources of information by the journalists.

In the present study, the law of defamation has been discussed and considered from the various aspects which need an in-depth knowledge of this branch of law, particularly to the extent such law impinges on the freedom of the press. The Press Council has recommended to the government to enact suitable legislation by which the existing law of defamation may be amended by statute wherever necessary. These recommendations are very much in line with the provisions of the [English] Defamation Act, 1952. They relate mostly to innocent dissemination of news, unintentional defamation, partial justification, fair comment, reports of certain proceedings to which qualified privilege attaches, *etc.*

P.M. Bakshi deserves full mead of praise for the industry and depth of knowledge that have gone into the preparation of this study. It can be legitimately expected that it will provide a fruitful and rewarding material for all those who are concerned with this branch of law.

Amar Nath Grover

Preface

I HAVE great pleasure in placing in your hands this excellent monograph, somewhat modestly titled, *Law of Defamation : Some Aspects* prepared by Professor P.M. Bakshi. The monograph is fifth in the series of collaborative publications programme between the Press Council of India and the Indian Law Institute. The monograph should be of interest to the community of law and media persons, upon whose creative collaboration much of the future of constitutional democracy in India depends.

Written lucidly, this study expounds the law of defamation as it stands today with all its weaknesses and strengths and makes or endorses some fundamental proposals for legal change. Our task will be amply fulfilled if the latter receive your critical support and leadership in a law reform campaign.

Some of the suggestions for change arise because of the differences in legislative and judicial approach. For example, while most courts do not require special damages to be proved in case of slander, the Indian Limitation Act, 1963, still continues to speak of special damages (p. 17); clearly, this dichotomy has to be removed by dispensing with the requirement of special damage. Other suggestions arise also at technical law reform levels, and amount to appeals to shed legislative inertia, *e.g.*, on unintentional defamation (pp. 34-35), direction absolving the defendant from personal appearance from court proceedings (pp. 67-68), or anomalies concerning the survival of the cause of action for defamation, which continues to be governed by the provisions of the Indian Succession Act (pp. 72-73). The survival of this latter is indeed a striking case of legislative inertia as one state—Kerala—following the 1924 Travancore Act—has already remedied these anomalies in 1976.

Even more striking is the legislative inertia retaining the notion of caste defamation in section 499 of the Indian Penal Code, which in its Explanation of "harming reputation" includes lowering of "the character of...person in respect of his caste". Professor P.M. Bakshi observes (p. 75) that so long as "caste prevails, an attempt to minimise or ignore existing conditions is contrary to public good". The conception of public good articulated by the Indian Constitution so elaborately, above all, is that of a casteless society and it forbids at the level of state action (excepting for the scheduled castes) deployment of any caste category, as an aspect of fundamental right to equality. That is the reason why the protection of Civil Rights Act makes it an offence to use insulting caste expressions attributing untouchability. To allow reputation to sustain in caste *per se* is, in the present opinion, unconstitutional. And criminal liability for defamation ought not to reinforce violation of the letter and spirit of the Indian Constitution.

Other change proposals do not belong to the genre of technical level reforms or to *status quo* by legislative default. Rather, they relate to crucial law-policy choices.

Should the law or the courts recognize 'privacy' as a tort? Neither the Law Commission of India nor the Second Press Commission think that the creation of such a tort is necessary (p. 23) but theirs need not be the last word on the subject, unless we take a view that non-governmental wisdom has no role to play in law reform process.

It is worth noting that the gerentocratic model of law reform adopted in India often creates half-hearted law reform proposals. For example, the Second Press Commission's extension of immunity of qualified privilege to translators protects the translator but not the "publication of offending matter in translation" (p. 29). While one welcomes, amidst the welter of quotational jurisprudence, this refreshing departure from the borrowed wisdom of the Faulks Committee Report (U.K.), and one admires the importance of the extension of immunity to the translator, the welcome thrust of this normative innovation is cancelled by denying the immunity to the publisher of the translation. Professor P.M. Bakshi describes this lukewarm stance reticently as "incongruous." But it, to my mind, constitutes an example of abortive law reform. If the translator is to be protected, insofar as she has translated the original in accordance with its "sense and substance", the publisher of this translation should be equally protected. Very often, the incentive to translate depends on the initiative of a good publisher; and in India, with its linguistic diversity, translation of foreign books into Indian languages and Indian books into other Indian languages, ought not to be discouraged by one-step-forward, two-step-backwards proposals such as the one under consideration.

An area of special importance is the role of the law of defamation in inhibiting corruption and related forms of criminogenic abuses of power. Can a journalist be compelled to disclose confidential sources of information in libel suits? Referring to the relevant American decisions, including the famous *Life* decision, Professor P.M. Bakshi concludes with the observation: "These sophistications need not be borrowed in India" (p. 71). While this view is entitled to respect, so is the question: "Why not?" I stand committed against all thoughtless transplants into Indian law and policy; we have borrowed too many "sophistications" as well as crudities from the First World law. But the issue is not whether we should borrow ideas. The issue relates to constitutionality of restrictions on freedom of speech and expression, in a society where public power is all too often used for private gain, and in which the struggle for accountability for the exercise of public power is an enervating process.

In discussing remedies in civil proceedings, this monograph endorses the Second Press Commission's standpoint that there ought to be a limited "right to reply" to be enforced by the Press Council. I am not clear as to why what the Commission describes as "an important remedy in the continental systems" is demoted to a system of conventional obligation. Fortunately, the Gujarat High Court has in 1981 adopted a more laudable approach to this remedy;[1] it is much to be hoped that the Supreme Court of India, in appeal, does not reverse it. Perhaps, the reason why a reference to this decision was omitted in this study was that the affirmation of the right to reply was made in the context of the right to freedom of speech and expression, and not in the context of defamation. But I believe that the compelling logic[2] of the Gujarat High Court's decision needs attention, even in the context of the law of defamation. If courts do pass orders, based on consent, providing full and complete apology in defamation cases, it is a short, but vital, step in this process that the remedy extends a detailed rebuttal of allegations, which is the surest and abiding way of rearticulating of injured reputations. It would be unreasonable in this preface to convey the significance of the Gujarat High Court's decision, either in terms of the invaluable fundamental right of freedom of speech and expression or in terms of its aptness and adequacy as a civil remedy to defamation. But it must be stated that what is good at the level of constitutional justification ought also to be so at the level of remedies in torts. This would even be more so in a society where electronic media remain, as in India, exclusively within the monopoly of the state.

The importance of this monograph lies not just in lucidity of exposition of a rather complex subject-matter or on the range of Indian and overseas information. To my mind it lies in a cogent plea for information through appropriate codification of the law of defamation. I hope that this book is approached as an agenda of law reform and will receive attention of the Indian Law Commission, whose primary mandate is reform of the system of administration of justice.

I must here record our warm appreciation of the patient editorial effort of Associate Professor N.S. Nahar.

New Delhi
17 June, 1986

Upendra Baxi

---

1. *M.D. Shah* v. *L.I.C. of India*, A.I.R. 1981 Guj. 15.
2. See, *contra*, Veena Bakshi, "Right to Reply: A Dissonant Note in the System of Freedom of Expression ..." (1982) 1 S.C.C. 1-26 (*Journ.*).

Contents

Table of Cases

ERRATA

Page		*For*	*Read*
8	F. N. 3	See also *inlra*	See also *infra*, p. 43
11	folio heading	Frame Work	Framework
12	heading	The concept of	The Concept of
23	para 4, line 4	eaves-dropping	eavesdropping
63	line 4	of "semi-facts"	of ',semi-facts"
123	Appendix III	Sections 499-502 I.P.C.	Sections 499-502, I.P.C.

CHAPTER I

Introduction

THE LAW of defamation, with which this study is concerned, presents, in a microcosm, the perennial conflict between the individual and the society. Its aim, to put the matter simply, is to protect reputation. But in defining the limits of the protection, one faces at every stage difficult questions arising from conflicts of values.

Two questions dominate the debate about liberty. The first is, when is it permissible to interfere with an individual's liberty ? The answer is simple—when the individual's actions cause harm to the other members of society. The second question is a difficult one—What is liberty, and what acts are to be regarded as permissible interference ? In other words, what kind of harm should be regarded as serious enough to justify the interference of the law ? These questions set up an antithesis between individual freedom and the demands of society. They also require us to consider more deeply what freedom and the community may have to offer to one another.

As these questions are always difficult whenever any point affecting the freedom of expression is at issue, they become still more so when one comes to defamation in relation to the freedom of expression. The reason is that defamation, by definition, deals with statements that harm the reputation of an individual (or an entity). By the very hypothesis, one begins with something harmful. *Ab initio*, the scales are tilted in favour of the individual defamed. This places a heavy burden on the other individual who seeks to tilt the scales in his own favour, by asserting the freedom of expression as justifying the causing of harm. He must convince the law-maker that there are overriding considerations which justify the making of a damaging statement and its publication. Those overriding considerations he must seek in some circumstance that persuades the law-maker that the harm to the individual must be disregarded in the interest of the good of society. In other words, he must persuade the law-maker that though the individual is harmed by a statement falling in a particular category, the harm to society would be greater if the statement were not allowed to be made and published; the individual's grievance must give way to the social interest in the freedom of expression. A mention of these considerations may sound to be unnecessary (since some would regard them as very elementary propositions). But they come up again and again when any issue pertaining to law of defamation on any topic arises—both when the controversy is concerned with what the present law on that topic *is* as a matter of reality, and when it is concerned with what the law *ought* to be as a matter of the ideal.

Habermas, a German writer on the science of politics, has analysed the rights guaranteed by the nineteenth century constitutions and other enactments, into four categories :

(*i*) rights relating to the reasoning public (for example, freedom of expression, freedom of assembly;

(ii) rights constituting the political prerogatives of private persons (for example, right to vote, right of petition);

(iii) right of an individual as a free person (for example, personal liberty, sanctity of correspondence); and

(iv) rights in the nature of property (for example equality before law, freedom from control, protection of private property including right to inheritance)[1].

The right of the reasoning public to freedom of expression falls in the first category, while the right of an individual to reputation falls in the third category. The two may conflict with each other, and the business of the law of defamation is to lay down rules for adjusting the conflict between the two.

The importance of this branch of law grows with civilisation. With an increase in the use of mass media of communication and with the spread of literacy, the growth of reading habit and the technological advances that enable the spoken and the written word to be conveyed to a very large number of people, there is naturally an increase, not only in the volume of written as well as oral matter, but also in the audience that it reaches or is capable of reaching. This increases the likelihood of harm to reputation. At the same time, with the advent of democracy and the recognition of the importance of freedom of expression and the emphasis placed on the right of the public to know the truth on certain matters, some parts of the law of defamation may need reform, so that a proper balance between private interest in reputation and public right to information about public matters is maintained.

Defamation is both a crime as well as a civil wrong. Criminal law on the subject is codified in India. On the subject of civil liability for defamation, there is no codified law in India and the rules that are applied by our courts are mostly those borrowed from the common law.[2] However, many of those rules of the common law have themselves undergone modification in the United Kingdom and in several other Commonwealth countries. Apart from that, some of those rules themselves need re-examination in the light of the changes that have taken place in various fields recently.

This study does not, however, profess to deal with the entire field of the law of defamation. It is confined to points on which there is a substantial justi-

1. Habermas, cited by Gianfrone. Poggi, *Development of Modern State* 104, 105. (1978).
2. See *infra* p. 4

fication for reform. Some preliminary matters may be disposed of before discussing the law topicwise.

Constitutional Competence

First, as to the question of the constitutional competence, the law relating to the tort of defamation would, from the point of view of distribution of legislative power, seem to fall under "actionable wrongs"[3] mentioned in entry 8 of the Concurrent List in the Seventh Schedule to the Constitution. Criminal law also falls under the Concurrent List.[4] This would cover the offence of defamation.

Questions of defamation frequently arise in regard to newspapers. The particular topic of "newspapers, books and printing presses" is also covered by entry 39 of the Concurrent List. Special forms of communication such as wireless, broadcasting and the like, find a mention in entry 31 of the Union List. Statements made at elections would seem to fall under entry 72 ot the Union List. The subject of privileges of Parliament and the state legislatures (entry 74 of the Union List and entry 39 of the State List) will be outside the scope of the study. The field of legislation relating to defamation is thus within Parliament's competence.

There still remains the aspect of fundamental rights. Under article 19(1) (*a*) of the Constitution of India, all citizens have the right to freedom of speech and expression, but, under article 19(2), reasonable restrictions can be imposed on the exercise of the right in the interests, *inter alia*, of public order, decency or morality, or in relation to defamation. The expression 'defamation' has thus been given a constitutional status. Force of habit may lead writers to use the expressions "libel" and "slander", but these are now giving way to "defamation", which is a more precise and meaningful expression. Incidentally, "libel" as used in many of the English text books is a wide word, transcending the boundaries of merely defamatory publications and covering many other species of libel, such as obscene libels, seditious libels, blasphemous libels and so on.

The Indian Constitution, while guaranteeing freedom of speech, allows restrictions to be imposed by law upon that freedom, provided the restrictions are (*a*) reasonable, and (*b*) imposed for one of the specified purposes—which specifically include defamation. The law of defamation does not infringe the right of freedom of speech guaranteed by article 19(1)(*a*). It is saved by clause (2) of that article.[5]

---

3. As to meaning of "actionable wrongs", see *State of Tripura* v. *Province of East Bengal*, A.I.R. 1951 S.C. 23.

4. Entries 1 and 2 of the Concurrent List mainly relate to criminal law and procedure.

5. *Namboodiri Pad* v. *Nambiar*, A.I.R. 1970 S.C. 2015, 2019.

Civil Liability for Defamation

As already stated above,[6] the law relating to defamation as a civil wrong has not been codified in India, unlike its counterpart in criminal law. Isolated enactments touching some aspects of defamation as a civil wrong are to be found in the statute book. Also, there has been considerable legislative activity in the field of protection of statements published from parliamentary proceedings. However, by and large, the rest of the law has to be deduced from the rules of the English common law without the substantial statutory modifications of the law that have been enacted in the United Kingdom, particularly the Defamation Act, 1952. The artificial distinction between libel and slander, which has dominated the common law for long, has not, however, been favoured by the majority of the courts in India. But in other respects the English common law rules are allowed to operate in this field, as on most topics falling within the domain of the law of torts.[7]

It is worthwhile to state some of the essential features of the law which may be basic to a consideration of the reforms that may be needed.

(i) First, the interest which the law of defamation seeks directly to protect is the interest which a person has in the good opinion of *others*. It is not an injury to that person's feelings that is sought to be remedied by the action for defamation, but an injury to his honour and reputation in the shape of a depreciation of the respect and esteem entertained by his fellowmen towards him. This aspect is of some importance, because, in recent times, increasing emphasis has been placed on another aspect dealing with a person's private life—the need for recognition of the right of privacy. While privacy is mainly intended to protect a person's feelings, the law of defamation protects his reputation. The first is subjective, while the second is objective.

(*ii*) Secondly, publication of the defamatory statement is an essential ingredient of the crime or tort of defamation. The law of defamation protects a person in regard to the good opinion entertained by *others*. If there is no publication of the statement, then there can be no harm to reputation, as the good opinion of others cannot then be adversely influenced by a statement which is not published.

(*iii*) Thirdly, like most other rights recognised by law, the right of an individual to reputation is not absolute and is subject to many over-riding considerations. There is a conflict of interest between individual interest in reputation and the public interest in having information (and even guidance) about public matters. On the one hand is the interest of the plaintiff in the continuance of his good reputation, which certainly needs protection: on the other is the freedom of speech to be allowed to other persons, being a freedom

6. See *supra* p. 2
7. *Cf.* Justice Mookerjee, in *Satish Chandra* v. *Ram Dayal De*, I.L.R. 48 Cal. 388. (1920).

which is needed not only for the full development of their personality but also for the right of the public to information about public affairs and (in some cases) certain private affairs also. Whenever a problem relating to the law of defamation has to be dealt with by a court or by the legislature, an attempt to balance the one against the other and an assessment of the relative values of each is usually involved. The attitude of the law in this regard is, therefore, fluctuating from time to time and from country to country. Broadly speaking, the common law recognised an almost unqualified and extremely wide right to reputation. Subsequent efforts towards reform of the law have almost all been negative, in the sense that they have sought to limit the remedy and thus to favour the prospective defendant. However, recently the pendulum seems to have occasionally swung in the opposite direction.

One finds, in this respect, a contrast between the English approach and the position in the United States. English law tended to give preference to the private interest in reputation while the law in the United States gave preference to the public interest.[8]

This does not however mean that the common law is plaintiff oriented. The common law has been much concerned that the imposition of liability for harmful speech should not interfere unduly with freedom of expression. The rule of strict liability in defamation was hedged with an elaborate system of privileges designed to protect public as well as private interests.[9] It is not as if the values of freedom of expression which, in India, have now been given constitutional status, have been neglected by the common law. The common law has all along taken cognizance of these values, if not in terms of a system superimposed by the constitution, then certainly in terms of a system intrinsic to the common law. And the result is that there is not only much that can be learned from the common law, but also much that can be left to it.

It may be mentioned that the common law of defamation is permeated with a comprehensive system of privileges—some of them absolute, but many of them conditional—allowing the speaker considerable leeway for error, and defeasible if the privilege is abused.[10] Where the defamatory statement was made on a privileged occasion (qualified privilege), malice became critical. The rationalisation underlying the privilege was that the circumstances dispelled the presumption of malice otherwise arising from defamatory statement.[11] Excessive publication was held to be evidence of malice. Excessive fault in failing to ascertain falsity was also evidence of malice.

---

8. *Cf.* the cases collected in Kenneth Davis, *Mass Media and the Supreme Court* 199-257 (1979, reprint).
9. Alfred Hill, Defamation and Privacy under the First Amendment, 76 *Columb. L.R.* 1205, 1311 (1976).
10. *Adams* v. *Ward*, [1917] A.C. 309, 326.
11. *Clark* v. *Molyneux*, (1877) 3 Q.B.D. 237.

It is because of the need for maintenance of a proper balance between public interest and private interest that one finds so many topics belonging to the law of defamation coming up again and again for consideration before academicians and law reformers—for example, (*i*) the defence of justification, (*ii*) the defence of fair comment, (*iii*) various categories of statements in respect of which a privilege should be recognised on the score that the statements were made on special occasion for special purposes; and (*iv*) if such a privilege is to be recognised, the controversy as to whether the privilege ought to be absolute or qualified. Sometimes, the wider public interest is victorious over the narrow interest of an individual, but at other times it is not so.

A person's reputation is his property and possibly more valuable than other properties and any words calculated to infringe this right afford a good cause of action.[12] The enjoyment of one's reputation includes all the moral and material advantage to which it may entitle him in his relationship with the society as a whole, or what Slesser, L.J., calls "the opportunities of receiving respectful consideration from the world".[13] In our recorded history, we have an authentic account of the administration of law at the time of Chandra Gupta Maurya in the shape of the famous treatise known as *Kautilya's Arthashastra*,[14]

Scope of Study

It should be mentioned at this stage that the present study does not purport to be a full examination of all aspects of the law of defamation. The focus will be on the aspects of special interest to the media. However, some matters, though not directly relevant to the media as such, will be dealt with in order to put the discussion in the proper perspective.

It is in the light of the need to balance several considerations that the social utility and the juristic soundness of the present law will have to be approached. Ordinarily, when considering the question of reforms in India on any subject, it is appropriate to begin with Indian material as the primary source. In the present case, however, an exception can be legitimately made. There has been a very valuable examination on the subject by two English committees—the Porter Committee and the Faulks Committee of 1975. It would be pedantic not to utilise the English experience. As regards the report of the Porter Committee, many of its recommendations have been already implemented in the United Kingdom. (Many other Commonwealth countries have also either anticipated the English reforms, or followed suit).

The Porter Committee was appointed in 1939 under the chairmanship of Lord Porter to consider the reforms of the law of defamation in pursuance of

12. *Rahim Baksh* v. *Bachcha Lall*, A.I.R. 1929 All. 214.
13. *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.*, 50 T.L.R. 588 at 587 (1934).
14. In Chapter XVIII of Book III of that treatise (which is the seventy-ninth chapter from the beginning), we find the author dealing with defamation.

an assurance given in Parliament when a private member's Law of Libel Amendment Bill was withdrawn.[15] After the committee gave its report, government could not find time to put forth a legislative measure implementing the recommendations of the committee, and ultimately, it was again a private member (Harold Lever) who introduced the Defamation Amendment Bill.[16]

The important defects existing in the law, in respect of which reforms were recommended by the Porter Committee in the United Kingdom, can be enumerated as follows :—

(*i*) unintentional defamation;

(*ii*) distinction between libel and slander, particularly, its operation in relation to radio and television;

(*iii*) privileges of newspapers;

(*iv*) defence of justification and defence of fair comment; and

(*v*) other changes. (These were mostly concerning procedural matters or matters of detail).

Many of these recommendations have been carried out in the Defamation Act, 1952. Subsequent to that, the Faulks Committee reported on the law of defamation. Its recommendations yet await implementation.

15. See 16 *Modern Law Review* 198 (1953).

16. See 494 *House of Commons Debates*, column 2390.

CHAPTER 2

The Position of the Press

IN INDIA, it is well-established, by decision rendered both before and after the Constitution came into force, that the freedom of the journalist is an ordinary part of freedom of the citizen, and (apart from statutory provisions specially applicable to the press) the privilege of the journalist is no other and no higher than that of an ordinary citizen.[1] The editor is in no better position than an ordinary citizen.[2] This aspect (as well as certain other aspects of the law of defamation) has been considered at some length in a fairly recent Calcutta case.[3]

Lord Shaw's observations are often quoted in this context, namely :

> The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to this power in the dissemination of printed matter may and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.[4]

A journalist who publishes a defamatory statement which is not true about a government servant is, therefore, in the eyes of the law, precisely in the same position as any other person. He is not specially privileged. Rather, he has a greater responsibility to guard against untruths, for the simple reason that his utterances have a far larger publication than the utterances of the individual, and by reason of their appearing in print, they are more likely to be believed by the ignorant.[5]

In the case of newspapers, one particular feature of interest is the fact that in the assessment of damages, the method of publication of the libel counts. What has been printed in a newspaper "may fall into any hands". Moreover, a printed matter is generally of the most permanent character and people are disposed to believe what they generally see in print. Hence, where a libel is

---

1. *Mitha Rustomji* v. *Nusserwanji Nowroji*, A.I.R. 1941 Bom. 278, 283; *Balasubramania* v. *Rajagopalachariar*, A.I.R. 1944 Mad. 484; *Khair-ud-Din* v. *Tara Singh*, A.I.R. 1927 Lah. 20, 23; *K.P. Narayanan* v. *Mahendrasingh*, A.I.R. 1957 Nag. 19.
2. *Balasubramania* v. *Rajagopalachariar*, *ibid.*
3. *N.J. Nanporia* v. *Brojendra Bhowmick*, 79 C.W.N. 531 (1974-75) See also *infra* p
4. *Channing Arnnold* v. *King-Emperor*, A.I.R. 1914 P.C. 116, at 124. See also *infra* p. 44.
5. *Khair-ud-Din* v. *Tara Singh*, *supra* note 1.

published in a newspaper, the person defamed is entitled to substantial damages. The mere fact that the proprietor of the paper had no knowledge of the publication of libel in his paper cannot absolve him from civil liability.[6]

The only sense in which being a journalist he may be said to have a special significance is the consideration that it is his duty to comment on matters of public interest or affecting the public good. He is, therefore, within his legitimate sphere when he offers criticism of what he considers *bona fide* for (conduct against) the public good. But the comment must be free from malice and in the public interest and *bona fide*.[7]

Some of the decisions, while describing the position of the journalist regarding comments made by him on matters of public interest, occasionally use the expression "privilege".[8] However, the use of the expression "privilege" in this context does not seem to be happy, because the law is that no privilege attaches to the position of the journalist.[9] The range of their assertions, their criticisms, their comments or their publication are as wide as and no wider than, that of any other citizen.[10]

6. *Munshi Ram* v. *Mela Ram*, A.I.R. 1936 Lah. 23-26.
7. *Vishan Sarup* v. *Nardeo Shastri*, A.I.R. 1965 All. 439, 441, para 16.
8 For example see, *Sirajmal* v. *B.G. Horriman*, A.I.R. 1917 Bom. 62.
9. *Gour Chandra* v. *Public Prosecutor*, A.I.R. 1962 Orissa 197, 202, para 26.
10. *Ibid*.

CHAPTER 3

The Legal Framework

THE LAW of defamation, pertaining to civil liability, is uncodified in India. On a large number of matters, such as the ingredients of the tort, the principles of liability, the defences available in civil actions for defamation and the burden of proof of various defences, courts broadly follow the rules of the common law.[1]

There are, however, a few important exceptions to the above mentioned general proposition. For example, most High Courts do not follow the English rule that slander is not actionable without special damage.[2]

In so far as the common law rules have proved to be productive of hardship, injustice or anomaly, attention must be paid to the need for reform. It is in this context that the statutory modifications effected elsewhere in the law of defamation require consideration. The reasons justifying these changes are substantially applicable in India. The experience of the working of common law rules in the United Kingdom broadly tallies with the position in India also. Professional opinion in India (*i.e.*, views of scholarly authors and media men) does not seem to necessitate a different approach in this regard.

This does not, of course, mean that there should be a slavish imitation of English law either in the areas where it has been reformed or in other areas. Some features of the English law of defamation are unsatisfactory and ill-suited to Indian conditions. In the subsequent chapters, this aspect will, of course, be borne in mind while making concrete suggestions.

Such points recommended by the Faulks Committee as are relevant to India will, of course, be dealt with in due course. The recommendations made by the Second Press Commission in India in its report will also be considered at the appropriate place.

Criminal Law

Coming to criminal liability, section 499 of the Indian Penal Code codifies the criminal law of defamation. The main paragraph of the section defines the offence in terms which definitely require a *mens rea*. The requisite mental element is constituted by an intention to harm reputation, or by knowledge that it would be harmed. Certain special situations, however, provide a defence to the criminal liability that would otherwise arise. Amongst themselves, these excep-

1. For the principal rules see *infra* p. 12.
2. Chapter 4, *infra*.

tions exhaust almost all the traditional defences to proceedings for defamation. As in civil liability, the defences are as important as the gist of the main section. The exceptions to the section are, therefore, as important as the main paragraph. In fact, they are invoked more often than the main provisions.

It is also to be noted that in India, the aggrieved person may proceed both in criminal and in civil law simultaneously, or bring a civil action after the criminal proceeding and *vice versa*. There is no question of election between civil and criminal remedy. An aggrieved person has both the remedies.[3] In a Bombay case,[4] the defendant was convicted in the criminal court for the offence of defamation and then the suit for the tort of defamation was brought for damages. Damages were granted by the court. though the first conviction was taken into consideration while considering the *quantum of damages to be awarded.*

3. *Asoke Kumar* v. *Fadha Kanto*, A.I.R. 1967 Cal 178.
4. *Hirabai Jehangir* v. *Dinsha v Edulji*, A.I.R. 1927 Bom. 22.

CHAPTER 4

The concept of Defamation : Libel and Slander

MANY DEFINITIONS of defamation have been attempted. Broadly speaking, defamation may be defined as a false and damaging statement.[1] The simplest and the best definition of defamation is that given by Justice Cave,[2] who has defined it as a "false statement about a man to his discredit."

The principal ingredients of the tort of defamation are as follows :

(*i*) Defamation as a tort consists in the publication of a statement (concerning the plaintiff) to a third person, exposing the plaintiff to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling.[3]

(*ii*) For the tort of defamation, what matters is the harm caused to the plaintiff and not the intention of the defendant. Hence, it is immaterial that the defendant had no intention to defame the plaintiff. It is enough that the statement refers to the plaintiff.

(*iii*) The statement must be published by the defendant to a third person. Publication only to the plaintiff when no third person could have heard the statement or read it, is not enough.

(iv) The statement must be false. A true statement cannot attract civil liability.

These points can be usefully elaborated.

(*i*) A statement is defamatory if its tendency is to excite against the plaintiff the adverse opinions or feelings of others. To say that a woman was raped or that a person was impotent or illegitimate is defamatory. It is not necessary that the moral or intellectual character of the plaintiff should be disparaged.

Reputation may be harmed expressly or indirectly by a statement which, taken along with certain special circumstances becomes defamatory. Such indirect statements fall under "innuendo". Thus, to say that "A was married to C today" may not be defamatory as a rule, but it would be defamatory if A has been already married to B, because then the statement would mean

1. *Paras Dass, son of Jugal Kishore* v. *Shri Paras Dass*, (1969) Delhi L.T. 241; *M.C. Verghese* v. *T.J. Poonan*, (1969) 1 S.C.C. 37.
2. *Scott* v. *Sampson*, 8 Q.B.D. 491 (1882).
3. *Neville* v. *Fine Art and General Insurance*, [1897] A.C. 68, 72.

that A has committed bigamy.

(*ii*) The motive or intention of the defendant is immaterial. The test is, whether right-thinking members of the community would understand the statement in a defamatory sense.[4]

The defendant may even be unaware of the plaintiff's existence.[5] Thus, a novelist writing about one "Artemus Jones" was held liable in tort for giving (in the novel) a defamatory description of that character. He used the name merely as a fictitious character, but there was, in reality, a living man with that very name and he could sue the novelist. [This part of the law has been reformed by statute in the United Kingdom but not in India].

(*iii*) Publication to a third person may be oral or in writing. It makes no difference in India whether the publication is in a transient or in a permanent form. Publication on radio or television, or in film or or gramophone record, can also be defamatory. Even gestures could be defamatory.

The *repetition* of defamatory matter is considered a new publication. Hence a newspaper cannot (after publishing a defamatory statement) take the defence that it is merely repeating what was communicated to it or re-publishing what was already published.[6] But the publication must be to a person other than the plaintiff.

(*iv*) In the law of torts, it is a defence that the statement alleged to be defamatory was true.[7] No civil action lies for publishing a true statement, because the theory is that a plaintiff cannot claim to have a better reputation than what he deserves. It is not necessary to further prove public benefit for attracting civil liability.

In an Allahabad case,[8] the words that were alleged to be defamatory, were :

> The witness should be asked how much debt he has incurred and whether he pays income-tax, he has amassed wealth by sucking the blood of the poor; witnesses like him are obtainable in abundance for Rs. 10 or Rs. 20; he should be asked how many times he appeared as a witness on being paid Rs. 1-8-0; he indulges in blackmarketing all over the world and now

4. *Sim* v. *Stretch*, (1936) 2 All E.R. 1237, 1240 (H.L.).
5. *Hulton* v. *Jones*, [1910] A.C. 20, 23.
6. *Cassidy* v. *Daily Mirror*, (1929) 2 K B. 331; *Cadam* v. *Beaverbrook Newspaper*, (1959) 1 All E.R. 453.
7. See discussion relating to Justification, *infra*.
8. *Purshottam Lal* v. *Prem Shankar*, A.I.R. 1966 All. 377.

he has come over here to suck the blood of a poor bank employee[9].

The portion relating to amassing the wealth "by sucking the blood" was held not to be defamatory. The rest of the statement was held to be defamatory.

It is libellous to make the imputation that a man is unfit for his profession or calling owing to want of ability of learning. In a Bombay case, [10] the court held that to say about a person in respect of his profession or calling that he is unfit or incompetent for the profession is defamatory. A statement made against a lawyer that certain persons had engaged him and reposed their confidence in him but he, after accepting the brief, betrayed their confidence and let his clients down, is highly libellous.[11]

A company or a corporation carrying on a trade has a trading character, and it may, therefore, sue for any words which reflect upon it in the way of its property or trade or business.[12]

Likewise a corporation is liable to an action for libel published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized or directed such publication.[13]

The mere use of abusive and insulting language is not sufficient to justify a claim for damages.[14]

In regard to the general concept of defamation, the most important topic that requires discussion is the supposed distinction between libel and slander. The distinction is well-embedded in English law and has survived in that country, notwithstanding the strong criticism thereof that one meets with from time to time. Most High Courts in India have refused to follow the English law on this point, as not suitable for Indian conditions. Some High Courts have, however, recognised this distinction.[15] A discussion of the distinction is, therefore, of some practical importance in India also.

---

9. *Id.* at 379.
10. *Mitha Rustomji* v. *Nusserwanji Nowroji*, A.I.R. 1941. Bom. 278.
11. *Raghunath Singh* v. *Mukandi Lal*, A.I.R. 1936 All. 780, 784.
12. *Union Benefit Guarantee Co.* v. *Thakorlal*, A.I.R. 1936 Bom. 114, 119. *South Heton Coal Co. Ltd.* v. *North-Eastern News Association Ltd.*, (1894) 1 Q.B. 133, *D & L Caterers Ltd.* v. *D'Agou*, (1945) K.B 364.
13 *Latimer* v. *Western Morning News Co.*, 25 L.T. 44; *Ahrath* v. *North Eastern Rly. Co.*, 11 A.C. 247, 253 (1886); *Bradshaw* v. *Waterlow & Sons Ltd.*, (1915) 3 K.B. 527; *Tiruveriamuthu Pillai* v. *Municipal Council*, A.I.R. 1961 Mad. 230.
14. *Girish Chandra Mitter* v. *Jatadhari*, 3 C.W.N. 551 (1898-99); *Bhoomi Money* v. *Notobar Biswas*, 5 C.W.N. 659 (1900-01); but see, *Suraj Narain* v. *Sita Ram*, A.I.R. 1939 All. 461: 37 A.L.J. 394 (1939).
15. See Appendix dealing with Indian case law on slander. See, in particular : *Hirabai* v. *Dinshaw*, I.L.R. 51 Bom. 167 (1927) : A I .R. 1927 Bom. 22; *Girdhari Lal* v. *Panjab Singh*, A.I.R. 1933 Lah. 727.

At common law, libel is actionable *per se*, while slander is actionable only on proof of special damage (except in certain special cases).[16] Many persons in the United Kingdom had felt that this distinction was artificial and illogical. The rationale underlying the distinction was that libel is something permanent (and damage may, therefore, be presumed), while slander is transitory and addressed to a small number and there should, therefore, be proof of special damage if it is to be actionable. However, with the development of modern means of communication like radio and television, whereunder an oral assertion could be spread out to a great number of persons while a written word might be limited to a few readers, the illogicality of the distinction becomes more acute. The Porter Committee did notice the illogicality of the distinction.[17] However, the majority of its members[18] were unable to recommend abolition of this doctrine. Two members of the committee[19] were in favour of the assimilation of the law of slander with that of libel, but in view of the opinion of the majority, no recommendation for the general assimilation of slander with libel was made by the Porter Committee.[20] However, as regards defamatory statements transmitted over the radio, the Porter Committee recommended that such statements should be deemed to be published "in writing" by the persons responsible for the broadcasting; this was to apply to television also.[21] Certain other changes were also recommended regarding the slander of a person in the way of his office, profession of trade.[22] Thus, while not disturbing the theoretical continuance of the distinction between libel and slander, the Porter Committee recommended some modifications therein. These recommendations have, in substance, been carried out, in section 1 of the Defamation Act, 1952 (broadcast statements) and sections 2 and 3 thereof (particular types of a slander).

In English law, libel is actionable *per se* without proof of special damage, while slander, in order to be actionable, must be accompanied by special damage, except in the following cases :

(1) When the words alleged to be slanderous charge the plaintiff with the commission of a crime punishable with imprisonment;

(2) when the words in question charge him with a contagious disease tending to exclude him from society;

(3) when the words in question impute unchastity or immorality to a woman or girls;

16. See *infra*.
17. See *Porter Committee Report*, paras 38 and 39.
18. *Id.* at para 40 and footnote thereto.
19. The two members who favoured assimilation were Richard O'Sullivan, K.C. and Professor E.C.S. Wade. Sullivan was editor of *Gatley on Libel and Slander*.
20. *Supra* note 17. Summary of Recommendations (No. 2) See also p. *infra* p. 16.
21. *Id.* at paras 42 and 43.
22. *Id.* at paras 44-49 and Summary of Recommendations No. 2 (*b*).

(4) when the words are spoken of a person in the way of his profession, calling or trade and impute to him misconduct in or unfitness for that profession, calling or trade; and

(5) an imputation calculated to disparage[23] a person in any office, profession, calling, trade or business, whether or not the words fall within the fourth category listed above. This is by virtue of a statutory provision.

In England, abolition of this distinction was proposed as early as 1843, by a committee appointed by the House of Lords. In the Porter Committee, which reported after the Second World War, while the majority recommended no change in this regard, two dissenting members favoured abolition of the distinction.[24] These were Richard O'Sullivan and E.C.S. Wade.[25] Later, in 1975, the Faulks Committee also recommended abolition of the distinction.[26] However, the law on this point has not yet been reformed in the United Kingdom.

In Australia, the distinction between libel and slander has been abolished in several states.[27]

The distinction has also been abolished in several provinces of Canada, including Alberta, Manitoba, North Brunswick and Prince Edward Island.[28] It may also be stated[29] that in Canada, the Uniform Defamation Act, 1944 does not recognise the distinction. Section 2 of the Act defines "defamation" as meaning libel or slander and section 3 of the same Act provides : "An action lies for defamation, and in an action for defamation where defamation is proved, damage shall be presumed."[30]

Eminent Judges in England have also criticised the distinction. In a case reported in 1864, Cockburn, C.J., and Crompton and Blackburn, JJ., regarded the distinction as unsatisfactory.[31] In an earlier English case, Campbell, L.C., had expressed the same view.[32] In India, in a Madras case, Turner, C.J., criticised the distinction and refused to apply it.[33] However, there is some uncer-

23. S. 2 of the Defamation Act, 1952.
24. See *supra* p. 15.
25. *Supra* note 17, paragraphs 44-45 and Summary of Recommendations, No. 2(*b*).
26. *Faulks Committee, Report*, Cmd. 5909, para 91 (1975).
27. See Fleming, *Torts* 488 (1961); New South Wales Defamation Act, 1958 (ss. 7-8); Queensland Defamation Law, 1889 (s.6); Tasmania Defamation Act, 1957 (s.9); A.C.T. Defamation Act, 1901 (s.3).
28. Fleming, *ibid*, footnote 38.
29. Uniform Defamation Act, 1944 (Canada), see s.2.
30. See Wright, *Torts* 712 (1954).
31. *Roberts* v. *Roberts*, 33 L.J.R.Q.B. 249 (1864).
32. *Lynch* v. *Knight*, 9 H.L.C. 577, 574 : 11 E.R. 854.
33. *Parvathi* v. *Mannar*, I.L.R. 8 Mad. 175 (1864).

tainty as to the position in India, since there are Bombay, Calcutta and Lahore rulings which hold, suggest or assume that the dictinction applies in India also.[34] The law on the subject should, therefore, be settled. The distinction should go, and its abolition in India should be achieved by specific statutory provisions to avoid all controversy. It needs to be provided that slander is also actionable without special damage.

In India, one special reason for clarifying the law as to the actionability of slander without special damage is the provision contained in the law of limitation.[35] In the earlier Indian Limitation Act, 1908, article 25, dealing with slander, was as follows :—

25 "for compensation for slander.	One year	When the words are spoken, or if the words are not actionable in themselves, *when the special damage complained of results.*"

In contrast, article 24 of that Act did not contemplate special damage for the actionability of libel. In the present Limitation Act, 1963 (36 of 1963), also article 76 [which is on the same lines as article 25 of the Act of 1908] contemplates *special damage* as an essential requisite for the actionability of slander. In contrast, article 75 of the Limitation Act does not require special damage for libel to be actionable.

However, most courts in India do not recognise this distinction and the majority view of Indian High Courts[36] needs to be codified in the interests of clarity and certainty of the law.

In the light of what is stated above, there should be enacted a specific statutory provision which will ensure that slander becomes actionable without special damage.

If the suggestion to assimilate libel and slander so as to obviate the need for special damage in any case of slander is accepted, it will, of course, be necessary to amend the relevant articles of the Limitation Act also.[37]

A possible amendment of the law to assimilate slander and libel could be on the following lines :—

"Words spoken and published shall not require special damage to render them actionable."

---

34. Case law in India on the subject shows the uncertainty. (See Appendix).
35. In the Law Commission's *Report on the Limitation Act, 1908* (3rd *Report*, p. 83, Schedule, article 1 and discussion at p. 44, para 116), suits founded on contract or on tort are all put together under one starting point, namely, the date on which the cause of action arises.
36. Case law on the subject in India is summarised in Appendix.
37. Articles 75-76, Limitation Act, 1863, see *supra*, p. 14.

CHAPTER 5

Defamation and Privacy

CONNECTED WITH defamation is the topic of privacy. The right of individuals to be free from highly offensive publicity concerning their private lives has now been recognised by many countries. Legal relief for invasion of privacy is achieved through an action for the "public disclosure of private facts". The interest of human dignity protected by this action, however, is viable only to the extent that the publicity is not "newsworthy"—*i.e.* not of legitimate public concern.

Although defamation and privacy are often discussed together, one should not forget that theoretically the scope of each is different, and the values which each seeks to protect are also different. In the first place, though the concept of privacy is, by now, understood in its broad essence, it should be borne in mind that privacy could possibly cover so many aspects of a person's life. In the United Kingdom, the Justice Committee on Privacy and the Law ended up with defining privacy as "that area of a man's life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade".[1] This is obviously very wide, not only because it makes the problem run into the general issues of liberty and the limits of state action, but also because it covers so many areas.[2] Later, the Younger Committee on Privacy in the United Kingdom concluded that there was no satisfactory definition of privacy for enacting a general law to protect it and that no such law was needed.[3]

Turning to the United States, Thomas Cooley, the American scholar, who is regarded as the father of the term "privacy", simply spoke of the right to be let alone; and this was also the concept made popular by the authors of the famous article on privacy published in 1890 in the *Harvard Law Review*.[4] Again the contest between what is private and what is not so occurs in a number of fields, and, in different fields, the distinction may mean different things.

Professor Westin says that privacy is, in the first place, "a state of solitude or small group intimacy".[5] The emphasis here is on protecting a person's right

1. Justice Committee, *Report on Privacy and the Law*, ch. 2, p 5, para 19 (1970).
2. Geoffrey Marshall, The Right to Privacy : A Sceptical View, 21 *McGill L.J.* 242, 243 (1975).
3. Younger Committee, *Report on Privacy*, Cmd. 5012 (1972).
4. Warren and Brandeis, The Right to Privacy, 4 *Harvard Law Rev.* 193, 195 (1890).
5. Alan F. Westin, *Privacy and Freedom* 7 (1970).

to be allowed to remain lone (solitude) or to remain with a chosen group. But even then, one must know the area of life in which solitude is claimed by asserting a right to privacy.

A recent book by Wacks is of interest. After giving a short history of privacy in English law, Wacks moves on to what he calls "The Obscurity of Privacy". His theme is that "the currency of privacy has been so devalued that it no longer warrants if it ever did serious consideration as a legal term of art".[6] Again, he says:

> Any attempt to restore it to what it quintessentially is—an interest of the personality—seems doomed to fail for it comes too late. "Privacy" has become as nebulous a concept as "happiness" or "security". Except as a general abstraction of an underlying value, it should not be used as a means to describe legal right or cause of action.[7]

He also analyses four main areas which are customarily lumped under the heading of privacy. They are : first, physical and electronic intrusion such as telephone tapping, searches; *etc.*, second, publicity; third, computers; and fourth, identity, meaning the appropriation of a person's name or likeness for commercial purposes and placing someone in a false light.

According to Prosser,[8] the law of privacy really embraces "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common"[9] apart from the fact that they interfere with the right "to be let alone". These four different torts are :

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[10]

The evolution of common law liability for the appropriation of personality is of interest. There are some well-known cases in passing off and defamation, the picturesque "name" cases of the nineteenth century beginning with *Lord Byron* v. *Johnston*[11] which has discerned property rights in a person's image, reputation and name. Outside the ambit of well established torts, there is a residue of case law which provides a remedy for wrongful appropriation of personality.

---

6. Raymond Wacks, *Protection of Privacy* 10 (1980).
7. *Id.* at 21
8. William L. Prosser, Privacy, 48 *Cali L. Rev.* 383 (1960).
9. *Id.* at 389.
10. *Ibid.*
11. (1816) 2 Mer 29 : 35 E.R. 851.

Privacy does, on occasions, enter into arguments about free speech. The question that arises is this: To what extent is privacy a candidate for further specific protection by extension of the existing civil and criminal heads of liability relevant to speech and expression ? Here again, some preliminary observations are in order. The concepts seem to protect a number of values. Even in the narrower sphere of gathering and disclosing information about a private individual, one must keep separate freedom from physical intrusion (on the one hand) and protection against unwelcome publicity about private affairs (on the other). As Geoffrey Marshall has stated :

> There cannot be a single answer to the question, "Is there a right to publish true but unwelcome or damaging information about other people" Anybody asked to answer this question in a particular case would want to know and weigh four considerations (assuming the information to be true):
>
> (a) Was the information acquired properly or innocently, or by wrongful means ?
>
> (b) Was there any consent to disclosure or could any be implied ?
>
> (c) Was the activity described or exposed itself innocent or disreputable ?
>
> (d) Was there any actual damage caused, or just annoyance ?[12]

All these questions, which are of a fairly difficult nature, must arise when one is concerned with the issue of privacy in the context of unwarranted disclosure of information. It is obvious that they necessitate the making of a choice between different values. The law cannot, by itself, decide them finally by legal principles alone.

Of course, the head of privacy concerned with "disclosure of private facts comes nearest to defamation".[13] From the legal aspect, it is useful to remember that protection against defamation and protection against breach of privacy (exemplified by the unwarranted disclosure of facts about the private lives and affairs of an individual), really cover two different areas of a person's life. The law of defamation protects the reputation of an individual (or a corporation). The law of privacy protects the feelings of an individual. Reputation is external. Feelings are internal. No doubt, one and the same statement can injure a person's reputation and also hurt his feelings. Nevertheless, one can also conceive of statements that injure one's feelings (*e.g.* statements giving details of a person's illness), without causing any harm to reputation. Reputation is a kind of intangible wealth. It is what a man possesses, because it represents what others think of an individual. It is, therefore, (as stated above) external. But the sense of intimacy, the desire to be left alone, and similar emotional underpinnings of privacy, belong exclusively to the area of an

---

12. *Supra* note 2 at 252.
13. See *supra* p. 19.

individual's feelings. They constitute his own experience. Therefore, they are internal. They do not constitute a person's wealth, tangible or intangible; they contribute to an individual's internal happiness. The fact that there is sometimes overlapping between statements that are defamatory and statements that impinge upon privacy should not make one forget the essential distinction between the two concepts.

The theoretical distinction between the two concepts of defamation and privacy can be well illustrated by taking a few instances. A company (or other artificial persons) can have a reputation and can, therefore, sue or prosecute for defamatory statements that cause harm to its reputation. But a company (or other artificial person) can never sue for the breach of privacy. Conversely, a person whom society regards as a moral wreck, an intellectual moron and a financial burden on the community, might have very little of reputation left for which he can claim legal protection. But he may still claim compensation for injury to feelings caused by a breach of privacy—provided the legal system that is applicable to him recognises the tort of violation of privacy as constituted by unwarranted disclosure of private facts. The interest protected is, in each case, different. As has been pointed out:

> Such invasions of privacy as disclosure of private facts and unauthorised use of a person's name and likeness may also amount to defamation, but, from the point of view of the interests protected this is, in principle, immaterial.[14]

The confusion between the wrong of defamation and the wrong of breach of privacy arises because (*i*) the statement may be defamatory as well as violative of privacy (as elaborated above), (*ii*) a balancing of interests is required in both, and some of the balancing considerations may be substantially identical; and (*iii*) the remedies used to protect both the types of wrongs (at least as evolved in common law jurisdictions) are similar.

Some of the points stated above could be made more concrete by referring to the position that prevails in a few other countries where violation of privacy is recognised as affording a cause of action. In the United States [15] one branch of the privacy tort (as evolved in that country) and the one most nearly protecting a pure privacy interest, offer a remedy for highly objectionable publicity of embarrassing private facts. In the situations encompassed by this branch of the tort of privacy, no civil action for defamation would lie, because the information that is disclosed is merely embarrassing, not false. A new cause of action has to be evolved. The leading American case on the subject (which was decided in California) involved a prostitute who, in 1918, had been acquit-

14. Stromholm, *Right of Privacy* and *Rights of the Personality* 132, para 82 (1967.)
15. Geoffrey Palmer, Defamation and Privacy Down Under, 64 *Iowa Law Rev.* 1209, 1235 (1979).

ted of a murder charge.[16] She had abandoned her life of shame and became entirely rehabilitated and had married into respectability. Some years later, the defendants made a movie based on her earlier life. As the statements made were true, there was no cause of action for defamation. However, she recovered on the score of unwarranted disclosure of facts.

In the English case of *Prince Albert* v. *Strange*[17] (not decided under the rubric of privacy), the court prevented the defendant from publishing etchings made by the royal parents of their children, the defendant having obtained the etchings by surreptitious means. In a New Zealand case,[18] the court awarded money damages against a physician who had given his female patient's husband a certificate concerning the patient's paranoia. The husband produced the certificate in separation proceedings, causing mental shock to the female patient. It was held that the physician should have foreseen that the certificate was likely to come to his patient's notice and that she was likely to suffer injury as a result.[19] The English and the New Zealand cases mentioned above (though not decided under the head of privacy) are cited here to show how the two torts differ, as also differ the values protected by each.

It may be pertinent to mention that in their famous article on privacy, Warren and Brandeis[20] stressed that, while recognising the right of privacy, proof of special damage should not be required, but that substantial compensation should be awarded for the presumed *injury to feelings*. In such an action, truth would not be an appropriate defence, because the right of privacy "implies the right not merely to prevent the inaccurate portrayal of private life, but to prevent its being depicted at all". But the publication of matters of public interest or consent to publication would prevent recovery by a plaintiff for violation of privacy. These exceptions or defences bar recovery otherwise permissible under the general rule in the United States that unwarranted disclosure of private facts is actionable.

Constitutional law may also super-impose exceptions on liability for defamation that might otherwise arise. Thus, in the United States[21] an exception has been recognised for "events of legitimate concern to the public" and this exception has been held by a decision of the Supreme Court to cover, *inter alia*, accurate publicity given to open public records relating to criminal prosecutions. The decision is grounded on the public's right to be informed of matters of significance to a democratic form of government, particularly judicial proceedings.

---

16. *Melvin* v. *Reid*, 112 Cal. App. 285, 297, Pac. 91 (1931)
17. 64 E.R. 293, 307, 315 (1849).
18. *Furniss* v. *Fitchett*, (1958) N.Z.L.R, 396, 398, 404, 408 (N.Z S.C.).
19. See *supra* note 15.
20. *Supra* note 4 at 219.
21. *Cox Broadcasting Corp.* v. *Martin Cohn*, 420 U.S. 469, 487, 491, 495, 496 (1975).

One can have a look at the law in a few continental countries also. According to section 390 of the Norwegian Penal Code, 1902,[22] it is a punishable act to "violate privacy by communicating, *in public*, facts concerning personal or domestic affairs". The notion 'in public" is defined in section 7, no. 2 of the code; an act is "public" when performed either by means of publishing a printed matter, or in the presence of a large number of persons or under such circumstances that it could easily be observed from a public place and is, in fact, observed by some persons who are present at, or in the vicinity of, the place where the act was committed.

In the United Kingdom, Lord Mancroft's Right of Privacy Bill dealt only with disclosure cases. According to the proposed clause 1 of that Bill, a person shall have a right of action against any other person who, without his consent, publishes of, or concerning, him in any newspaper or by means of any cinematograph exhibition or any television or sound broadcast any words—that term including, under section 5(1), pictures, visual images, gestures and other methods of signifying meaning—relating to his personal affairs or conduct.[23]

Indian law has not yet come to recognise privacy as a tort under the head of unwarranted disclosure of private facts.

It may be mentioned that the Second Press Commission, in its report, while dealing with the right of privacy, did not consider it necessary to recommend legislation on the subject. It noted that the Law Commission had recommended legislation regarding eaves-dropping and unauthorised publication of photographs and it endorsed the recommendations of the Law Commission to amend the Indian Penal Code to include offences against privacy for the above purpose. But beyond that, the Press Commission, having regard to the fact that privacy is an extremely nebulous concept and also to the fact that criteria which may constitute its violation cannot be easily drawn out, did not recommend any general law regarding privacy. At the same time, it recommended that section 13(1)'c) of the Press Council Act, 1978, should be amended by adding, after the words "the maintenance of high standards of public taste", the words "including respect for privacy."[24].

22. S. 390, Norwegian Penal Code, 1902, cited by Stromholm, *supra* note 14 at 123.
23. Cl. 1, Right of Privacy Bill, cited by Stromholm, *Id.* at 169.
24. *Second Press Commission Report*, vol. 1, Ch 6, pp. 67-77, particularly paragraphs 41 to 44 (1982).

CHAPTER 6

Publication and Re-publication

PUBLICATION IS an essential ingredient of defamation. In the leading English case, Lord Esher observed that publication is the "making known the defamatory matter, after it has been written to some person other than the person of whom it is written".[1]

Thus, publication must be to a third party. In India, this is the position in civil and criminal law. Section 499 of the Indian Penal Code punishes a person who "makes or publishes any imputation".[2] The word "makes" in this section does not render the mere making of a statement an offence—*i.e.* the mere composing of a libel is not punishable. This is clear from explanation 4 to section 499, which provides that an imputation harms the reputation of a person only when it lowers him in the estimation of others. Gour[3] has pointed out that in section 499, the word "makes" supplements the sense of "publishes" and that the latter is derived from Latin *publicus*, standing for *poplicus*, derived from *populus* (people). Thus, sending a notice of suit to a policeman who made a search of the plaintiff's premises without a warrant is not an offence of defamation of the policeman.[4] This was an Allahabad Full Bench (majority) view. Same is the Bombay view.[5] The only significance of the word "makes" in section 499 is to render the maker *liable*, provided the statement is *published*. The question whether the statement is communicated to a third party is, therefore, still material for the purposes of section 499 of the Indian Penal Code as was pointed out in a Madhya Pradesh case.[6] Publication, therefore, implies communication to a third person, for the purposes of criminal liability also.[7]

The principle that publication must be to a third person has raised an interesting question as to whether publication to one's spouse constitutes publication for purposes of the law of defamation. The question arose in a Kerala case,[8] but the facts of the case were rather peculiar. A person wrote to his wife a letter containing defamatory statements about the wife's father. The father unauthorisedly opened the letter and brought a complaint of defamation against the husband. The Kerala High Court held that the husband had

1. *Pullman* v. *Water Hill & Co.*, (1891) 1 Q.B. 524, 527.
2. See Appendix 3 for the text of s. 499, I.P.C.
3. Gour, *Penal Law* of *India* 2617 (7th ed., 1962).
4. *Queen-Empress* v. *Taki Hussain*, I.L.R. 7 All. 205 (1885) (F.B.) (majority 4 : 1).
5. *Queen-Empress* v. *Sadashiv Atmaram*, I.L.R. 18 Bom. 205.
6. *In re Bhulliram Jalum*, A.I.R. 1962 M.P. 382 : (1962) 2 Cr. L.J. 760.
7. *Amar Singh* v. *Badalia*, (1965) 2 Cr. L.J. 693.
8. *T.J. Ponnen* v. *M.C. Varghese*, A.I.R. 1967 Ker. 228.

committed no offence and that the father's prying into the letters addressed to his daughter was unlawful and violative of the principle underlying section 122 of the Evidence Act. The father could not take advantage of a wrong to which he was a party and then base a complaint of defamation thereon. In fact, there is an English authority[9] holding that intention to publish will not be presumed where a third party writes defamatory matter and keeps it locked.

The judgment of the Kerala High Court was reversed on certain other grounds[10] (not material to the present discussion) by the Supreme Court.

How far a statement made by a spouse to another spouse enjoys absolute privilege[11] has become a matter of some debate in India. So far as criminal liability is concerned, it can be taken as reasonably certain that the exceptions to criminal liability are only those mentioned in section 499 of the Indian Penal Code, and what does not fall within the language of those exceptions cannot be immune from liability for defamation.[12]

A defamatory statement made by one spouse to the other, as distinct from a statement made to the spouse of the plaintiff, cannot in the United Kingdom be the subject of an action.[13] The older authorities put this upon the ground that there has been no publication; but it seems preferable today, when the fiction of the unity of husband and wife has been discarded, to say that it is an instance of absolute privilege, the reason for which is the highly confidential character of the relationship.[14]

According to the Madras High Court the doctrine of "unity of the spouses", is, of course, not recognised in India and cannot be made the basis of an immunity from liability for defamation.[15] This was noticed by the Supreme Court in a case relating to criminal liability, though it did not express any final opinion on the point.[16]

However, it is possible to reason that statements made to spouses should enjoy absolute privilege on the basis of the need to protect marital confidences with the greatest sanctity. The real reason for recognising such a privilege is not the supposed identity of personality of the spouses, but the valid postulate that such confidences should be protected. As Salmond has pointed out, a defamatory statement made by one spouse to the other (as distinct from a statement made to the *spouse of the plaintiff*) cannot be the subject of an action

9. *Supra* note 1 at 527. See also *supra* p. 24.
10. *M.C. Verghese* v. *T.J. Poonan*, (1969) 1 S.C.C. 37, 40.
11. As to absolute privilege, see *infra*.
12. See *T. Mudali* v. *T. Ammal*, I.L.R. 49 Mad. 728 (1926). (S. 499 I.P.C. held to be exhaustive).
13. Salmond and Heuston, *Law of Torts* 154, para 56 (6) (1981).
14. Prosser, *Law of Torts* 785.
15. *Abdul Khadar* v. *Taib Begum*, A.I.R. 1957 Mad. 339.
16. *M.C. Verghese* v. *T.J. Poonan*, *supra* note 10 at 40.

and that today, when the fiction of unity of the husband and wife has been discarded, it seems preferable to state "that it is an instance of absolute privilege, the reason for which is the highly confidential character of the relationship".[17] There is, therefore, need to amplify section 499 of the Indian Penal Code, by inserting an additional exception on the subject.[18] Of course, the point is valid for civil liability also.

Questions of publication also arise, but in a slightly different form, when a communication is made on a privileged occasion to a person in regard to whom the occasion is privileged and the question arises whether the privilege is lost by publication to another person. Broadly, the position, both in the United Kingdom[19] and in India,[20] is that where a communication to the third person is made in the ordinary course of business, the privilege is not exceeded.

The offence of defamation may be committed even if the matter is contained in a plaint filed in the court. Such filing amounts to enough "publication" for the purpose of the law of defamation.[21]

Re-publication of a libel is actionable even though the statement containing the republication mentions that the information is derived from a particular named source.[22] The same rule applies to slander; every repetition of a slander heard from others is actionable, unless the occasion be privileged.[23] The person repeating a slanderous statement cannot take the defence that he was merely repeating what had been uttered by others.[24]

17. Salmond and Heuston, *supra* note 13 at 154-155, para 56(6), citing Prosser, *supra* note 14.
18. Point for law reform (s. 499, I.P.C.).
19. *Osborn* v. *Thomas Boulter & Son*, (1930) 2 K.B. 226.
20. *Keshab Lal* v. *Provat Chandra*, A.I.R. 1938 Cal. 667; *Ajit Singh* v. *Radha Kishen*, A.I.R. 1931 Lah. 246.
21. *Thangavelu Chettiar* v. *Ponnammal*, A.I.R. 1966 Mad. 363 (criminal case).
22. *G. Chandrasekhar Pillai* v. *G. Raman Pillai*, (1964) Ker. L.T. 317.
23. *Mi Ngwe* v. *Mi Pwa Su*, 27 I.C. 979: 7 Burma Law Times 253, cited by Mitter, *Law of Defamation and Malicious Prosecutions* 74 (1978).
24. *Raghunath Singh* v. *Mukandi Lal*, A.I.R. 1936 All. 780.

CHAPTER 7

Liability for Defamation : Joint Responsibility and Multiple Publication

I. Joint Responsibility

ASSUMING THAT a statement is defamatory, certain questions arise as to who are the persons to be held liable for it. Publication, as already stated, is one of the essential ingredients of defamation. Since the process of "publication" involves a number of stages and a number of individuals, it becomes necessary to determine who is legally liable. This raises several issues. One such issue concerns joint responsibility for a defamatory statement.

Every person who takes part in the publication of a libel is *prima facie* liable for it[1]. Thus, for example, where an article containing a libel is published in a newspaper, the following persons are *prima facie* liable (in a civil action) :

(*i*) The writer of the article.

(*ii*) The proprietors[2] of the newspaper. They will be liable as participants in the publication and are also likely to be vicariously liable as the employers of editor and the journalist concerned.

(*iii*) The editor.

(*iv*) The printers; and

(*v*) subject to an important qualification,[3] to be discussed below,[4] persons such as newspaper vendors, who sell the newspaper to the public.

The Second Press Commission stated the existing position regarding joint responsibility for the publication of a defamatory statement, as under :

> Under the existing law, where an action for defamation is brought in respect of a joint publication of a libel, malice on the part of any one of the persons jointly responsible for such publication is sufficient to defeat the plea of 'fair comment' or 'qualified privilege' so as to render all the defendants jointly liable to the plaintiff. The presence of malice on the part of

1. *Halsbury's, Laws of England* 17, 19, 35, paras 32, 38, 65 (4th ed., 1979), see also Duncan & Neill, *Defamation* 41, para 8, 12 and f.n. 1 (1978).

2. *Munshi Ram* v. *Melaram*, A.I.R. 1936 Lah. 23, 26 (knowledge of publication not required).

3. Innocent dissemination.

4. See *infra* pp. 28, 29.

one defendant renders the whole of the damage recoverable from a co-defendant who may himself be wholly innocent of malice. We think the following statement of law on the point by Gatley is most appropriate :

> Where a person has published defamatory words on an occasion of qualified privilege the privilege will only be defeated so far as he is concerned if he himself is malicious, or if he is liable on the basis of respondent-superior for the malice of a servant or agent.[5]

The Second Press Commission analysed the impact "of this principle in our law" as under :

(1) A publisher of a newspaper will continue to be vicariously responsible for the malice of his agent;

(2) A publisher of a newspaper will not be vicariously responsible for the malice of an independent contractor; and

(3) A publisher of a newspaper will not be vicariously liable for the malice of an unsolicited correspondent, whether anonymous or otherwise.[6]

In this context, the Second Press Commission also referred to the recommendations made by the Faulks Committee in the United Kingdom[7] on the question of the liability of distributors, printers and translators of written publications. The Faulks Committee had noted that distributors of written publications (for example, booksellers, news agents and news vendors) enjoy the special defence of "innocent dissemination" which is not available to the first or main publishers of a work. It recommended the extension of the defence of innocent dissemination to printers, subject to the same or similar conditions and safeguards as in the case of distributors. It may be mentioned that under the defence of innocent dissemination[8] (which is non-statutory in character) distributors are protected[9] if they can prove that :

(a) They did not know that the book or paper contained the libel complained of; and

(b) they did not know that the book or paper was of a character likely to contain a libel; and

(c) such want of knowledge was not due to any negligence on their part.[10]

5. *Second Press Commission*, *Report*, vol. 1, p. 48, para 82 (1982).
6. *Ibid*
7. *Faulks Committee Report*, Cmd. 5909, pp. 81-85, paras 293-315 (1975).
8. See *infra* p. 29.
9. *Emmens* v. *Pottle*, (1885) 16 Q.B D. 354; *Vizetelly* v. *Mudie's Select Library*, (1900) 2 Q.B. 170.
10. *Supra* note 7 at 81, para 294.

The Faulks Committee noted that the effect of this recommendation would be that printers who print, in the normal course of their business of everyday printing, will have a defence. But where they are put on enquiry as to the potentially defamatory character of the work complained of, or are in any way negligent in failing to enquire (about the defamatory character) in relation to any given work they would continue to be liable. In fact, the Faulks Committee added that if the experience of distributors is any guide, the recommendation, if accepted, would ensure that printers are normally not joined as defendants. As regards translators,[11] it recommended the enactment of the following clause, providing for a defence which "would be equivalent in nature to qualified privilege" :

> Publication by any person of a translation made by him (whether oral or written) shall be protected by qualified privilege provided that the words complained of have been translated in accordance with the sense and substance of the original.

Having noted the recommendations of the Faulks Committee summarised above, the Second Press Commission in India recorded the following conclusion on the subject :

> We suggest that the recommendations of the Faulks Committee with regard to the liability of distributors (*sic*) and printers be incorporated in our law. As regards translation, we are of the view that protection should be given to the translator, *but not to the publication of offending matter in translation.*[12]

The suggestion made by the Second Press Commission is worth considering,[13] but the refinement made by it not to extend the defence to *publishers* of offending matter in translation seems, with respect, to be incongruous. There is no basis for making a distinction between translator and publisher.

Innocent Dissemination

Innocent dissemination, referred to above, [14] is a common law defence applicable to distributors of defamatory matter.[15]

This defence is not to be confused with the statutory defence of "innocent publication", created in the United Kingdom by section 4 of the Defamation Act, 1952, The latter is meant for the publisher who proves that the words complained of were published by him innocently *in relation to the person*

---

11. *Id* at 84-85, paras 311-313.
12. *Supra* note 5 at para 83 (emphasis added).
13. Point for Law Reform. See *infra* p. 3
14. *Supra* p. 28.
15. Salmond & Heuston, *Torts* 147 (1981) Duncan & Neill, *supra* note 1, at 116-117, paras 16.03 to 16.06.

defamed and the plea must be accompanied by an offer of amends. The former, on the other hand, is meant for a person who acts merely as the distributor of defamatory matter. It is of importance to[16] ;

(*a*) wholesalers,

(*b*) book sellers,

(*c*) news agents, and

(*d*) libraries,

who, in the absence of such a defence, might be liable in respect of the publication of libels contained in books, newspapers, magazines and other reading material which they make available to the public.

There is no Indian case directly dealing with the common law of "innocent dissemination". However, the rule of the English law on the subject will, presumably, be followed in India.

As to the English cases on the subject, they are rather numerous.[17] The precise basis on which the law regards the innocent disseminator as not liable for the libel so disseminated is, however, still, obscure. In one of the English cases dealing with the liability of distributors of newspapers and periodicals,[18] Scrutton, L.J., while agreeing with the test laid down in an earlier case[19] by Romer, L.J., also added this comment of his own :

> It was difficult to state exactly the principles on which newsvendors, circulating libraries, the British Museum, and other institutions of that kind who did not themselves write the libels, but sold or otherwise passed on to others, books and documents which in fact contained libels, were freed from responsibility.[20]

Discussing the basis of the immunity from liability enjoyed by distributors who disseminate defamatory matter innocently, Lord Esher, M.R.,[21] said that news agents (unlike authors or printers) only disseminated that which contained the libel. If the defendants did not know that the paper was likely to contain a libel and ought not to have known this even after using reasonable care, then they did not "publish" the libel. On this view, there is no "publication" in such cases. But, on another view, the disseminator does "publish" the libel, but if he can establish innocent dissemination, he is not responsible for it.[22]

16. Duncan & Neill, *supra* note 1 at 115, para 16.02.
17. *Halsbury's*, *supra* note 1 at 38, para 72.
18. *Bottomley* v. *Woolworth & Co.*, 48 T.L.R. 521 (1932).
19. *Vizetelly* v. *Mudie's Select Library Ltd.*, *supra* note 9.
20. *Supra* note 18.
21. *Emmens* v. *Pottle*, *supra* note 9.
22. Duncan & Neill, *supra* note 1 at 117, para 16.04, note 3.

The difference between the two views, noted above, has a practical importance since the question of burden of proof arises, which itself is of considerable practical value. Should the *defendant* prove that he acted innocently in disseminating the statement, or should the *plaintiff* prove that the defendant had knowledge (or an opportunity of acquiring knowledge) of likelihood of harm to the plaintiff's reputation ? In a fairly recent English case,[23] conflicting approaches to the subject were reflected in the *dicta* in the judgments of the Court of Appeal. According to Bridge, L.J., "Any disseminator of defamatory matter is liable to the party defamed, subject to the defence of innocent dissemination."[24] This *dictum* would seem to place on the defendant the burden of proving innocence in regard to knowledge of likelihood of harm to reputation. However, in the same case, Lord Denning, M.R., (in a dissenting judgment) was inclined to place to burden of proof on the plaintiff, citing in support the *Restatement*.[25] He observed :

> Commonsense and fairness require that *no subordinate* distributor, from top to bottom, should be held liable for a libel contained in it unless he knew or ought to have known that the newspaper or periodical contained a libel on the plaintiff himself; that is to say, it contained a libel on the plaintiff which could not be justified or excused : *and I should have thought that it was for the plaintiff to prove this.*[26]

There is, thus, some obscurity in the United Kingdom as to the burden of proof. However, if an amendment is to be made in the Indian law on the subject, it could be framed on the following lines :

> A person shall not be liable in tort for defamation on the ground that he has distributed a publication containing defamatory matter if, at the time of distribution, having taken all reasonable care, he did not know that it contained any such matter as aforesaid and had no reason to suspect that it was likely to do so.[27]
>
> A similar protection should be extended (with same safeguards) to—
>
> (*a*) the translator, and
>
> (*b*) the publisher of offending matter in translation.

In India, the criminal liability of the owner of a newspaper (or, for that matter, any other person) for a defamatory statement published in the newspaper is governed by the terms of section 499 of the Indian Penal Code. The section contains the crucial words "makes or publishers any imputation con-

23. *Goldsmith* v. *Sperrings Ltd.*, (1977) 2 All E.R. 566.
24. *Id.* at 587.
25. *Restatement, Torts* (1965 Supplement), s. 581, comment.
26. *Supra* note 23 at 572 (emphasis added).
27. Point for Law reform.

cerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person...." Obviously, section 499 requires a mental element, which must be proved by the prosecution. At the same time, section 7 of the Press and Registration of Books Act, 1867 provides certain rules of evidence[28] or presumptions as to who is to be deemed to be the printer, *etc.*, of a newspaper. These presumption do not alter or dilute the ingredients of criminal liability for defamation (or any other offence committed by printed words), as provided in section 499 of the Indian Penal Code, but they may render the task of the accused more onerous as regards proof.

II. Multiple publication

Another feature of the law of defamation that often provokes debate is multiple publication. The Second Press Commission endorsed the following recommendation of the Australian Law Reform Commission on the subject :

> The rule as to separate publication should be abrogated and a single publication rule adopted. The multiple publication of particular material should give rise to one cause of action only but, in such an action, the plaintiff should have relief appropriate to all publications. This rule could, however, give rise to unsatisfactory results where a plaintiff was unaware of the extent of the multiple publications and, therefore, did not seek appropriate remedies. The suggestion of allowing the court a discretion to permit the plaintiff to bring further proceedings in respect of the same matter is a flexible approach, but it may result in uncertainty. Even after an action is determined, a defendant may be in doubt whether further proceedings may be brought against him. The position of a plaintiff who discovers that a publication received wider coverage than was first apparent is not entirely clear. Certainty is important to the parties. Moreover, it is desirable that the courts have full information as to the extent of publication in determining relief in the first action. The defendant is likely to know the extent of publication; he should be encouraged to disclose it. Accordingly, the plaintiff should be limited to a single action in respect of a multiple publication but only to the extent disclosed in the action. The plaintiff will have a separate right of action in respect of any additional publication. This will automatically cover any further publication after the first trial as well as any publications which the defendant failed to admit. The provision will leave no doubt as to the rights of the parties. A defendant who makes full disclosure will be liable, if at all, for the multiple publication once for all. A plaintiff who dis-

---

28. *Sardar Bhagat Singh Akali* v. *Lachman Singh Akali*, 73 C.W.N. 1, 3, para 6 (1968-69) following *State of Maharashtra* v. *Dr. R.B. Chowdhuri*, (1968) 1 S.C.A. 49.

covers undisclosed material is certain that the court will entertain his action.[29]

Such a reform of the law is eminently sensible and is worth adopting in India also. The recommendation of the Faulks Committee on the subject was as under :

> [W] here proceedings by a person in respect of a defamation have been concluded either by settlement, judgment or final order at a trial or by discontinuance, the plaintiff should not be permitted to bring or continue any proceedings against the defendant in that action in respect of the same or any other publication of the same matter except with the leave of the court and on notice to defendant.[30]

29. *Supra* note 5 at 47-48.
30. *Supra* note 7 at 80, para 291.

CHAPTER 8

Unintentional Defamation

APART FROM liability for defamation in general, a question of considerable importance in regard to civil liability pertains to unintentional defamation.

By "unintentional defamation" is meant a statement which, though it may actually harm the plaintiff's reputation, was not intended to harm it, nor even known to be likely to do so. A series of English judicial decisions had led to a very anomalous situation in this regard. A person could be liable in tort for defamation, even though he did not know of the existence of the plaintiff. The injustice of this position had been realised for long. The Porter Committee recommended[1] that where a statement which is, in fact, defamatory of the plaintiff is made by a defendant who was unaware that it would be understood to refer to the plaintiff or was unaware of the facts which would make the statement defamatory of him, the plaintiff's remedy should be restricted to requiring the defendant to publish an explanation and an apology, and that if such explanation and apology is published, no damages should be recoverable.

Section 4 of the Defamation Act, 1952 has implemented this recommendation in the United Kingdom. The section is worth adopting in India.

It should be mentioned that there is a Madras case[2] which does not follow the common law rule relating to unintentional defamation. The appellant in that case published in his newspaper a news item charging a person (the respondent) with smuggling. The respondent alleged that the news item referred to him, and was defamatory of him. The lower court awarded damages against the appellant on the basis of the House of Lords decision of 1910.[3] It was held that by the Madras High Court that :

> The law of defamation as part of the law of torts, as applied and enforced under the common law of England, is applied to this country *only on the basis* of justice, equity and good conscience. There is no statutory law compelling the courts of this country to apply the English principles....[4]

The rule laid down by the majority of the House of Lords in the judgment mentioned above was held not applicable in India. As it had been

---

1. *Porter Committee Report*, paragraphs 61-64, and Summary of Recommendations, No. 4.
2. *T.V. Ramasubba* v. *A.M. Ahamed Mohideen*, A.I.R. 1972 Mad. 398.
3. *Hulton* v. *Jones*, (1910) A.C. 20.
4. *Supra* note 2 at 405.

proved that the appellant, when he published the news item, did not know of the existence of the respondent and he had, later on, also published a correction in his paper (that the item did not refer to the respondent) the appellant was not held liable for damages. There were two earlier rulings[5] taking the same view, which the Madras High Court followed in the above case.

It is not certain whether other High Courts will take the same view. Hence an express provision would be useful.

5. *Naganatha Sastri v. Subramania Iyer*, A.I.R. 1918 Mad. 703; *Secretary of State* v. *Rukminibai*, A.I.R. 1937 Nag. 354.

CHAPTER 9

Defences : Justification and Fair Comment

I. Justification

LIABILITY TO be sued or prosecuted for defamation, arising under the general rules applicable on the subject, may still not arise where the circumstances are such that there is a legally recognised defence to such a suit or prosecution. The three most important defences so arising are justification, fair comment, and privilege.

Justification, which really should be called a defence of "truth", has had a long history. For a long time, truth has been a defence to civil proceeding for defamation under the title "justification" in England. The defence that the words alleged to be defamatory are true, is a common law defence, the basis of which was stated by Littledale, J., as follows : "[T]he law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not, to possess."[1]

In order to succeed in the defence of justification, the defendant must prove the truth of the words complained of, not only in their literal meaning, but also in their inferential meaning or innuendo. Of course, even at common law, it is not necessary to prove the truth of every detail of the words.[2]

In India also, truth is a complete defence to a civil action for libel.[3] The burden of proof of the defence of justification lies on the defendant. All defamatory words are presumed to be false, but the defendant can rebut the presumption.[4] Even if the defendant has given evidence in his own favour the burden of proving truth would still lie on the defendant and would not shift to the plaintiff.[5] It follows that the benefit of any doubt as to the truth of any defamatory allegation must be given to the plaintiff.[6] Mere honest belief in truth of the fact stated is not a defence.[7]

When a newspaper publishes a defamatory statement charging a person with conduct which would render the defamed person liable to a criminal prosecution, and subsequently attempts to justify such a charge, the facts of the

1. *M'Pherson* v. *Daniels*, 10B & C 263 at 272 (1929) : 109 E.R. 448, 451
2. *Sutherland* v. *Stopes*, (1925) A.C. 47, 79 (H.L.).
3. *Lachhmi Narain* v. *Shambhu Nath*, A.I.R. 1931 All. 126.
4. *Mitha Rustomji* v. *Nusserwanji Nowroji*, A.I.R. 1941 Bom. 278; *Union Benefit Guarantee Co Ltd.* v. *Thakorlal*, A.I.R. 1936 Bom. 114.
5. *Bhagwan Singh* v. *Ujagir Singh*, A.I.R. 1940 Pat. 23; *Khair-Ud-Din* v. *Tara Singh*, A.I.R. 1927 Lah. 20, 23.
6. *Khair-Ud-Din, ibid;* see also *Infra* p. 37.
7. See *infra*, ch 12.

charge must be proved with the same degree of precision as would be required in a prosecution on the basis of such a charge. If the allegations cannot be proved, the benefit of doubt goes to the defamed person.[8] In order to succeed upon the plea of justification, the defendants in a libel action have to prove that the whole of the defamatory matter is substantially true. Thus, if a newspaper publishes an allegation that two persons were severely beaten by or with the complicity of a person in charge of a jail, it is not enough to prove that one person was in fact so beaten.[9]

In criminal prosecutions for defamation, mere truth is not a defence. It must further be proved that the publication was for the public good.[10] In this context, a matter which requires consideration is whether, in civil cases, mere truth should be a defence. At present, so far as libel as an actionable wrong is concerned, truth is, in itself, a defence and a person who makes a "true" statement is *ipso facto* exempted from civil liability for defamation. The result is that however greatly a statement may injure the reputation of a person, he has no remedy if what is published is true. This hardly seems to be a satisfactory position. A man's reputation is his intangible wealth and others should not be the judges of the question whether he deserves that reputation or not. Notwithstanding what Littledale, J., has said,[11] it is not understood what social good is served by permitting character assassination merely because what is alleged is true. In principle, the mere fact that a certain statement is true, ought not to suffice to justify its publication, unless there is a counter-balancing element of public interest. At present, at common law—and, therefore, presumably in India also—*so far as civil liability is concerned*, mere truth is a defence. This position ought to be changed, and the law should require that publication of the statement must be proved to be for the public good if it is to be immune from liability. This is particularly desirable having regard to the tremendous power of modern media. As has been observed by one writer, modern news media "can obliterate a man's reputation within five minutes."[12]

Incidentally, it may be mentioned that in four Australian states, truth, in itself, is not a complete defence in a civil action, and the defendant must establish public good also.[13]

It is true that there is a shade of opinion to the contrary which would be opposed to any insistence on the requirement of "public good". But it is submitted that if the law seriously wants to protect reputation, truth in itself

8. *Khair-Ud-Din*, *supra* note 5 at 22.
9. *Id.* at 23.
10. S. 499, I.P.C., Ist Exception, see *infra*, Appendix 3
11. *M'Pherson* v. *Daniels*, *supra* note 1 at 273
12. Jerome Lawrence Merin, Libel and the Supreme Court, in Kenneth S. Devol (ed.), *Mass Media and the Supreme Court* 242 at 248 (1979, Reprint).
13. Geoffrey Palmer, Defamation and Privacy Down Under, 64 *Ipwa Law Rev.* 1209 at 1239 (1979).

should not be a defence to a civil action for defamation. The fact that A, a woman, is unchaste does not, for example, morally justify B in *publicising* A's unchastity. No *social interest* is served by allowing B to circulate such statements. In the absence of any social interest (public good), A's legal interest in her own reputation ought to continue to receive legal protection. As between A's right to reputation and B's supposed 'liberty' of expression, the balance ought to tilt in A's favour, in the absence of any element of public good. A has everything to gain by getting legal protection for her reputation. B has nothing to lose, if A receives such legal protection. He gets nothing except a malicious self satisfaction in making others unhappy. Society also gains nothing by statements publicising A's unchastity.

On the vexed question of truth as a defence to a civil action for defamation, the Second Press Commission in India expressed itself as under :

> It has been represented to us that truth should not be a complete defence unless it is accompanied by public interest. This question engaged the attention of the Australian Law Reform Commission and it was of the view that truth, by itself, should be a complete defence in civil actions, as 'public benefit' is a vague term and publishers are entitled to a clear guidance as to the rules binding them. The requirement of public benefit would be adding too much of a burden on journalists ..
>
> We see no reason for any departure from the present position. Truth alone should continue to be a complete defence.

We endorse the following recommendation of the Australian Law Reform Commission in this regard :

> The Commission believed that it should be a defence to the publication of defamatory matter that the matter complained of is true. Matter should be regarded as being true if the matter, and any imputation in the matter relied upon in the action by the plaintiff was in substance true or in substance was not materially different from the truth. In determining the effect of the publication for the purpose of assessing damages, the court should have regard to the whole of the publication and the extent to which the defendant proves the truth of the matter concerning the plaintiff in the publication.[14]

With respect, it may be submitted that this is a matter on which a different view can be taken. It is wrong to assume that "public good" is a vague concept. The concept is well known in other areas of law and even in the sphere of defamation.[15] Constitutional adjudication in India under article 19 has yielded abundant case law on "public interest" and allied concepts. It is, difficult to understand why the process of balancing, which is implicit in such concepts, cannot be employed without difficulty in determining civil liability for defamatory statements.

14. *Second Press Commission Report*, vol. I, pp. 46-47, paras 77, 78 (1982).
15. S. 499, I.P.C.

In this context, it should be pointed out that no value is absolute in itself, and truth is no exception to this general proposition. In a recent judgment[16] relating to defamation though the issue there related to the question of privilege, the High Court of Kerala made the following observations which are pertinent to the point under discussion: [16a]

> Although the law protects pursuit of truth, it must be pursued with a sense of fairness, propriety and proportion. As observed by Knight Bruce, V.C. in De G & S. 28 (quoted by Lord Macnaghten in *Macintosh* v. *Dun*):[17]
>
> > The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them . .. Truth, like all other good things, may be loved unwisely—may be pursued too keenly —may cost too much.

While dealing with the concept of "public good", which is relevant in criminal law, it is relevant to refer to a judgment of the Supreme Court[18] in which the defence under the ninth exception to section 499 of the Indian Penal Code had been raised. A weekly magazine had published a report to the effect that a female detenu had got pregnant during her detention in the Bhopal central jail. The report contained aspersions that there was a mixing of male and female detenues in the central jail and that the woman had become pregnant through one S, the appellant (a politician). The husband of the woman was not a detenu. *Prima facie*, the statement was defamatory and the question to be decided was whether the ninth exception to section 499 of the Penal Code which, *inter alia*, exempts statements made in good faith for the public good, applied to the case. It appears that the High Court of Madhya Pradesh had quashed the proceedings in the trial court, mainly on the basis of a confidential inquiry report. It was in this context that the Supreme Court, setting aside the order of the High Court, pointed out that good faith and public good were questions that needed evidence for their decision and the inquiry report could not be made use of, there must be evidence *aliunde*.

The Supreme Court pointed out that public good was a question of fact like any other relevant fact in issue. This aspect was emphasised by A.P. Sen, and Chinnappa Reddy, JJ. Incidentally, the judgment also emphasised that journalists are in no better position than any other person. Chinnappa Reddy, J., in his concurring judgment, dealt with the ingredients of good faith and public good at great length. Discussing the matter from the perspective

16. *Dr. P.H. Daniel* v. *Krishna Iyer*, (1982) K.L.T. 1.

16a. *Id.* at 8, para 18.

17. (1908) A.C. 390, 400, 401.

18. *Sewakram Sobhani* v. *R.K. Karanjiya*, A.I.R. 1981 S.C. 1514.

of the facts of the case before him, he pointed out that several questions arose for consideration where the ninth exception to section 499 was invoked. Good faith and public good, he pointed out, were questions of fact and matters of evidence. After narrating some of the facts relevant to the question of good faith, he said that the evidence would also have to be taken on the following issues :

> Was the article merely intended to malign and scandalise the complainant or the party to which he belonged ? Was the article intended to expose the rottenness of a jail administration which permitted free sexual approaches between male and female detenus ? Was the article intended to expose the despicable character of persons who were passing off as saintly leaders ? Was the article merely intended to provide salacious reading material for readers who had a peculiar taste for scandals ? These and several other questions may arise for consideration, depending on the stand taken by the accused at the trial and how the complainant proposes to demolish the defence.[19]

Since the High Court had quashed the proceedings in the trial court (under its revisional powers) without allowing a trial of the case on the above matters which needed evidence, the Supreme Court set aside the order of the High Court.

At common law, the defence of justification suffered from one drawback, in that, a person taking this defence had to prove the truth of the *whole libel*, *i.e.*, of every defamatory statement contained in the words complained of. Inaccuracy in mere details did not matter, in the sense that it is enough if the allegation is true in material particulars[20] but the main gravamen of the charge had to be substantiated.

Where the words complained of contained more than one charge or are otherwise severable, the defendant may justify only part of the words (partial justification). He remains liable to pay damages in respect of the part not justified, if it is defamatory and materially injures the plaintiff's reputation, if no other defence is established.[21]

The Porter Committee recommended that the defendant should be entitled to succeed in a defence of justification, if he proved that so substantial a portion of the defamatory allegations was true as to lead the court to the view that any remaining allegations which had not been proved to be true did not add appreciably to the injury to the plaintiff's reputation.[22]

After the Porter Committee Report in the United Kingdom, the defence of

19. *Id.* at 1520.

20. *Alexander* v. *N.E. Rly. Co.*, (1856) 6B & S 340: 122 E.R. 1221.

21. *Clarke* v *Taylor*, (1836) B Biug. NjC. 654, 664, 665: 132 E.R. 252; *Halsbury's Laws of England* 44-45, para 87 (4th ed.)

22. *Porter Committee Report*, Summary of Recommendations, No. 5, paragraphs 74-82.

partial justification has been extended by statute. In certain circumstances, a partial justification now provides a complete defence.[23] Section 5 of the Defamation Act provides :

> *Justification*—In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges.

The provision to this effect should be incorporated in India also.

Justification must be expressly pleaded as a defence in the written statement. Merely offering evidence of truth of the defamatory statement in cross-examination is not enough.[24] In cases of criminal libel, the accused who takes the defence of justification has not only (*i*) to prove the *whole of the libel*, but also (*ii*) to prove it as strictly as if the complainant were being prosecuted for the crime.[25] The first proposition is true of civil cases also, as is illustrated by a well known English case[26] in which the defendant wrote that the plaintiff was a "libellous journalist", but could prove only one single instance of a successful libel action against the plaintiff. The defence of truth was held to be not established.

Similarly, in a Rangoon case,[27] the words used of the plaintiff were that he was "topsyturvy". The defendant, who had pleaded justification, could give only one instance of the plaintiff's inconsistency. It was held that the defence had not been proved.

II. Fair Comment

One may now turn to the defence of "fair comment" which can be availed of where the defendant has merely offered a fair comment on a matter submitted by the plaintiff to the judgment of the public. Nothing is defamatory which is a fair comment on a matter of public interest.[28] The defence is of peculiar use to journalists. Expressions of opinion contained in editorials, critical articles, letters to the editor and news items of an analytical nature are covered chiefly by the defence[29] of the right of fair comment as applied to a defamatory publication.

---

23. S 5, Defamation Act, 1952.
24. *Ajit Singh* v. *Radha Kishen*, A.I.R. 1931 Lah, 216.
25. *Harbhajan Singh* v. *State of Punjab*, A.I.R. 1961 Punj : 215.
26. *Wakeley* v. *Cook & Healey*, 4 E.R. 511, 516 (1849).
27. *U.Po Hnyin* v. *U. Tun Than*, A.I.R. 1940 Rang. 21.
28. *London Artists* v. *Littler*, (1969) 2 All E.R. 193, 198.
29. Hohenberg, *Professional Journalist* 376 (1980, Indian Reprint)

The defence is based on public policy—the right of all persons and publications to comment and criticise without malicious intent the work of those who draws public attention. Among those who invite such criticism by the nature of their activities are holders and seekers of public office, authors and playwrights, public performers—such as actors, actresses and sports participants and critics as well as others whose careers similarly are based on public attention. An honest and fair expression of opinion on a matter of public interest is not actionable, even though the opinion be untrue. It is not necessary that the court must agree with the comment.[30]

The following ingredients must be satisfied for successfully raising the defence of fair comment :

(*i*) [T] he matter commented upon must be one of public interest or concern. Matters of government and politics are of public interest; so is anything which the general public is invited to purchase, to listen to or to attend.[31]

(*ii*) The comment must be based on facts.

(*iii*) The comment must be fair, *i.e.*. it must be made in the *bona fide* belief that it is a true assessment and not made maliciously.[32]

Certain propositions are well established in the United Kingdom relating to the defence of fair comment, and in general, the position in India is substantially the same.[33] It is a defence to an action for defamation for the defendant to prove that the words complained of were published by him as fair comment on a matter of public interest. But the defence can be defeated by proof that the defendant was actuated by express malice.[34]

The main principles relating to the defence of fair comment have been stated by Duncan and Neill as follows :

(a) the comment must be on a matter of public interest;

(b) the comment must be based on fact;

(c) the comment, though it can include inferences of fact, must be recognisable as comment;

(d) the comment must satisy the following objective test ; could any man honestly express that opinion on the proved facts ;

(e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by

30. *Broadway Approvals Ltd.* v. *Odhams Press Ltd.* (*No. 2*), (1960) 1 W.L.R. 805, 817.
31. J.S. Colyer, *Modern View of the Law of Torts* 144 (1906).
32. *Showerings Ltd.* v. *Postgrade*, '*The Times*' dated 3 Nov. 1965 [the "*Babycham* case, referred to by Colyer, *Ibid.*]
33. See *infra*, pp. 43, 44. 45.
34. Duncan & Neill, *Defamation* 62, para 12.01 (1978).

express malice.[35]

The defence of fair comment has been recognised and much utilised in litigation in India also.[36]

The first condition of the defence is that the comment must be on a matter of public interest. Both in the United Kingdom and in India, no definition has been given of "public interest". As Lord Denning said, whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on, or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make a fair comment.[37]

In India also, the same approach has been adopted. Generally, a matter or subject which invites public attention or is open to public discussion or criticism is a matter of public interest[38] which is not the same thing as a matter of general interest.[39] In this context, newspapers do not stand in any special position.[40]

The second condition is that the comment itself must be based on fact. This is an aspect not often appreciated by laymen, but it is well established in law that the comment must be based on a fact which either the person commenting states or which is indicated by him with sufficient clarity to enable the reader or listener to ascertain the matter on which the comment is being made. Thus, if the person defaming states that some public man has really done something and then asserts that such conduct is disgraceful, then it is a comment on the conduct of the plaintiff. Or, he may identify the conduct by a clear reference, so that he enables the reader to judge whether the opinion is well founded. But if he asserts that the plaintiff has been guilty of disgraceful conduct and does not state what that conduct was, this is an allegation of fact for which the defence of fair comment does not apply though the defence of truth can be taken if the facts alleged can be proved.[41] In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence.

More or less the same principle has been followed in India. Where the facts supporting the comment are not stated at least with substantial correctness, the defence is not available. The leading case on the subject dealing with

---

35. *Id.* at para 12.02.
36. *Mitha Rustamji*, *supra* note 4; *Vishan Sarup* v. *Nardeo Shastri*, A.I.R. 1965 All. 439; *W.S. Irwin* v. *D.J. Reid*, A.I.R. 1921 Cal. 282.
37. *London Artists* v. *Littler*, *supra* note 28.
38. *Union Benefit Guarantee Co.* v. *Thakorlal*, *supra* note 4.
39. *R.K. Karanjia* v. *K.M.D. Thackersey*, A I R. 1970 Bom. 424, 429.
40. See *sup ra*, ch. 1.
41. *Kemsley* v. *Foot*, (1952) 1 All E.R. 501, 505 (Lord Porter).

this particular aspect is a Calcutta case.[42] In that case, the allegation was that the plaintiff was a member of a terrorist organisation. The following passage from the judgment is material :

> If the conclusion recommended to his readers that the plaintiff is guilty of this charge, he is in the position of a person who has publicly charged another with a crime, and, apart from a defence of privilege, he must either justify or pay. It is no defence whatever to say that he honestly believed in his accusation, or that he had a certain amount of reason for making it; or that Lord Lytton had said it before; or that he was concerned to support a policy of Government.[43]

The third condition is that the comment, though it can include inferences of fact, must be recognizable as comment. Comment may, on the one hand, sometimes consist in a statement of fact and such statement of fact can be held to be a comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from the facts stated or referred to by him or in the common knowledge of the person speaking and those to whom the words are addressed and from which his conclusions may reasonably be inferred.[44] What is meant by "comment" is described by Cussen, J., in an Australian case.[45]

The position in India in this respect does not seem to differ although the point does not seem to have been clinched so vividly as in the United Kingdom except in the Calcutta case.[46] It is recognised that the defence of fair comment protects only statements of opinion and not defamatory allegations of facts.[47]

The fourth condition is that the comment must be fair, that is to say, the comment is such that it must pass the following objective test, namely, "Could any man honestly express that opinion on the proved facts." The above formulation is based on the summing up of Lord Hewart, C.J., in *Stopes* v. *Sutherland* [48] where he said, "The question which the jury must consider is this would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said."[49]

The above statement was itself based on the observations of Lord Esher, M.R., in an earlier case,[50] which was adopted by Lord Porter in the House of Lords in 1950.[51]

---

42. *Subhash Chandra Bose* v. *R. Knight & Sons*, A.I.R 1929 Cal. 69.
43. *Id*, at 73.
44. *O'Brien* v. *Marquis of Salisbury*, 54 J.P. 215, 216 (1889).
45. *Alarke* v. *Norton*, (1910) V L.R 494, 499, cited in Duncan & Neill, *supra* note 34, para 12.11, f. 4.
46. *Supra* note 42
47. *T.G Goswami* v. *The State*, A I.R. 1952 Pepsu 165.
48. 39 T.L.R. 677 (1923).
49. See Duncan & Neill, *supra* note 34 at 69, para 12.15.
50. *Merivale* v *Carson*, 20 Q.B.D. 275, 280 (1887).
51. *Turner* v. *Metro-Goldwyn-Mayer*, (1950) 1 All E.R. 449, 461.

In general, these principles have been followed in India, as would be obvious from a few Indian decisions.[52] Exaggeration does not make a comment unfair.[53] Comment may be "fair" even though it is wrong or is expressed with violence and heat.[54]

There seems to be some uncertainty in the United Kingdom as to the comments which impute dishonesty or other dishonourable conduct or motive to the plaintiff. It has been pointed out[55] that there are three possible views where the comment contains imputations to the effect that the plaintiff has acted dishonestly or dishonourably or has been inspired by some base motive.

The three possible views on the subject are :

(*a*) The defence of fair comment does not apply at all to suggestions, even though in the form of comment, that the plaintiff has acted dishonestly or dishonourably or been prompted by some base motive. Such suggestions must be defended, if at all, by showing that they are correct inferences from the primary facts, that is, by a defence of justification.

(*b*) The defence of fair comment can apply to such suggestions (suggestions of dishonesty) but the defendant has to satisfy the jury that the comment was a reasonable inference from the facts commented on.

(*c*) The general test of fair comment applies and the question is : would any man honestly express that opinion on the proved facts ?

It is not clear whether Indian courts would follow any of these tests, since the point does not appear to have been clinched so far in India.

A fairly recent Australian case[56] seems to take the widest view, namely, that the general test of fair comment applies and the question is: would any man honestly express that opinion on the proved facts ? In that case decided by the High Court of Australia, the alleged libel (review of a theatrical production) contained statements that the producer dishonestly suppressed the role of another player to highlight his own role. The High Court was ordering a new trial on the ground that the judge had wrongly withdrawn from the jury the issue of fact or comment. The following observations of the High Court of Australia are pertinent :

---

52. *U.B. Guarantee Co.* v. *Thakorlal*, *supra* note 4 at 124; *Mitha Rustomji*, *supra* note 4 at 283.

53 *Murlidhar* v. *Narayendas*, A.I.R. 1914 Sind 85; *Purushottam Vijay* v. *The State* A.I.R. 1961 M.P. 205.

54. *Raghunath Singh* v. *Mukandi Lal*, A.I.R. 1936 All. 780, citing Fraser, *Law of Libel & Slander* 161, 163, 165 (6th ed.)

55. Duncan & Neill, *supra* note 34 at 71-72, para 12.19.

56. *O'Shaughnessy* v. *Mirror Newspapers Ltd.*, 45 A.L.J.R. 59 (1970).

It is not that the writer merely failed to preface what she had to say a bout the production with some formula such as "it seemed to me"; it is rather that the jury could have found that an imputation of dishonesty was levelled against the plaintiff as the writer's explanation of what she asserted to be a waste of talent. If what was written had been no more than comment it only had to be fair, but, if it were fact, it had to be correct to defeat the plaintiff's claim. It was, we think, for the jury to decide whether there were any statements of defamatory facts and because the issue was withdrawn from them we consider that the trial miscarried.

To safeguard ourselves from too broad a generalization we would add that it is not our view that an imputation of dishonesty is always an assertion of fact. It is part of the freedom allowed by the common law to those who comment on matters of public interest that facts truly stated can be used as the basis of an imputation of corruption or dishonesty on the part of the person involved.[57]

A criticism generally made in the United Kingdom of the defence of fair comment was that the defence was unduly technical. The defence was available only in respect of expressions of opinion, and the portions of the statements that were in the nature of "assertions of facts" had to be proved strictly. In other words, the law envisaged a strict compartmentalisation between "facts" and "opinions". Now, normally, defamatory matter would not consist *solely* of expressions of opinion. Facts and expressions of opinions would be mixed up. Hence a strict adherence to the rule would cause injustice. The Porter Committee noted this defect,[58] and recommended[59] that the basis of the defence of fair comment should be broadened in a manner similar to that recommended by that committee in relation to the defence of justification.

This recommendation of the Porter Committee has been substantially carried out by section 6 of the Defamation Act of 1952. (There is, however, some controversy as to how far the Act has carried out the *precise* recommendations of the committee). This section appears to be worth adopting in India also.[60]

The Bombay High Court[61] has held that a statement made before an officer who was not acting in a judicial capacity and who was not exercising the attributes of a court cannot be said to be absolutely privileged. Hence defamatory statements made before a police officer in the course of investigation are not absolutely privileged; only a qualified privilege attaches to them.

57. *Id.* at 60-61.
58. *Supra* note 22, para 83-91.
59. *Id.*, Summary of Recommendations No. 6.
60. Point for law reform.
61. *Maroti Sadashiv* v. *Godubai Narayanrao*, A.I.R. 1959 Bom. 443.

Proof of malice destroys a qualified privilege. Where untrue statements were made with full knowledge that those statements were untrue, that fact is a conclusive proof of malice.[62] The judgment dissents from decisions of Calcutta[63] and Madras[64] to the contrary, which had held that such statements enjoyed absolute privilege. In fact, another Calcutta case decides that the privilege is a qualified one in such circumstances.[65]

Justification appears to exclude apology. The following observations made in an English case[66] were cited in a judgment of the Orissa High Court:[67]

> Indeed, the fact that the defendants attempted to justify them was the antithesis of recantation. The partial apology in a pleading which attempted to justify a large amount of defamatory untruths was no apology at all. It is inevitably, in such a context, mere *faux bonhomie*.[68]

62. *Id* at 446-47, para 15-16.
63. *Madhab Chandra* v. *Nirodchandra*, A.I.R. 1939 Cal. 447.
64. *Sanjivi Reddi* v. *Koneri Reddi*, A.I.R. 1926 Mad 521.
65. *Joseph Mayr* v. *Charles*, 47, C.W.N. 627 (1943); I.L.R. (1943) 1 Cal. 250.
66. *Dingle* v. *Associated Newspaper Ltd.*, (1961) 2 Q.B. 160, 165 (Holroyd Pearce, L.J.).
67. *State of Orissa* v. *N.R. Swamy*, I.L.R. (1970) Cutt. 1264.
68. Quoted in *id*, at 1306.

CHAPTER 10

Absolute Privilege

Categories of Privilege

THE LAW of defamation recognises certain occasions in regard to which the public interest requires that a person should be protected from liability for a defamatory statement, even though the defamatory words cannot be proved to be true or defended as fair comment. These occasions have come to be known as privileged occasions. The protection or privilege is of two kinds—absolute and qualified.[1] Where the privilege is "absolute", defendant's malice does not destroy the privilege, in view of its absolute character. Where the privilege is "qualified", malice destroys the privilege.[2]

Leaving aside statutory provisions of minor importance, the defence of absolute privilege applies to statements falling in the following categories :

(a) statements made in the course of proceedings of Parliament, or published from those proceedings by authority of Parliament:

(b) statements in the nature of publication of proceedings in Parliament by private agencies, where such publication is protected by express provision of the Constitution:

(c) statements made in the course of judicial or quasi-judicial proceedings;

(d) statements made by one officer of state to another in the course of duty;[3]

(e) fair and accurate reports of judicial proceedings, if published contemporaneously;[4]

(f) communications between solicitor (and presumably, counsel) and the client.[5]

The wide general principle which underlines the defence of privilege is the common convenience and welfare of society or the general interest of society.[6]

The categories of absolute privilege enumerated above will bear detailed

---

1. Duncan & Neill, *Defamation* 81, para 13.01 (1978).
2. *Infra*, ch. 11.
3. *Supra* note 1 at 81, para 13.02, categories (*a*) to (*d*).
4. *Ibid*, category (*g*), and *id*, at 109, para 14.29.
5. *Id*. at 81, para 13.02, category (*h*)
6. *M.G. Perera* v. *A.V. Peiris*, A.I.R. 1949 P.C. 108, 119, quoting *Macintosh* v. *Dun*, (1908) A.C. 390. As to spouses, see *supra* pp. 25, 26.

discussion. As the categories are primarily derived from English law, it may be convenient to state first the position in English law, and then to deal with the Indian law.

Parliamentary Proceedings in England

Privilege in category (a) is, in England, derived from the Bill of Rights and is regarded as a part of the wider privilege conferred by article 9 of the Bill of Rights, which provides as under :

> [T]hat the freedom of speech and debates of proceedings in Parliament ought not to be impeached or questioned in any Court or suppressed out of Parliament.

The protection applies in civil, as well as in criminal, proceedings. It applies even though the statements are untrue to the knowledge of the person making them, and however injurious they may be to the interests of the third person.[7]

Parliamentary Proceedings in India

In India, article 105, clauses (1) and (2) of the Constitution, provide as under :

> (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.
>
> (2) No member of Parliament shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

The persons who come to be protected against legal action by article 105(2) of the Constitution are—

(*i*) members of Parliament who speak or vote in the House or committee thereof; and

(*ii*) persons who publish, under parliamentary authority, the proceedings of the House or committee thereof.

As to the first part of article 105 (2), it may be noted that the freedom of speech or vote conferred thereby is absolute. No *legal* action lies for defamation against a member for anything said in a House of Parliament or in a committee thereof. It is not necessary, for the immunity created by this clause

7. *Ex parte Wason*, (1869) 4 Q.B. 573; 576; *Church of Scientology of California* v. *Johnson-Smith*, (1972) 1 All E.R. 378.

to be operative, that what was said was *relevant* to the business of the House; it is enough if Parliament was sitting and if what was said was said in the course of the business of the House[8].

As to the second part of article 105 (2), 'authority', in this context, means *express authority*[9].

Publication of Parliamentary Proceedings by Private Agencies

As regards category (b), in the United Kingdom, proctection is conferred on the publication of parliamentary proceedings by the Parliamentary Papers Act, 1840.

In India also, article 361-A of the Constitution confers protection on newspapers and some others for publishing proceedings of Parliament and state legislatures. But this is a qualified privilege, unlike the absolute privilege conferred on those who publish the *proceedings under* parliamentary authority.[10] No person[11] shall be liable to any civil or criminal proceedings in any court in respect of the *publication in a newspaper* of a substantially true report of proceedings of Parliament or state legislatures. The defence is not available if the publication is accompanied by malice. Nor is it available where the proceedings of Parliament were held in secret.

Subject to these conditions, the protection in respect of parliamentary proceedings is available not only to reports in newspapers, but also to news agency reports containing material for publication in a newspaper, and also to reports or matters broadcast by means of wireless telegraph as part of any programme or service provided by a broadcasting station.

Judicial Proceedings

As regards category (c), concerned with statements in judicial proceedings, the general rule on the subject was stated in England by Lopes, L.J. in *Royal Aquarium and Summer and Winter Garden Society* v *Parkinson*[12] as follows:

> The authorities establish beyond all question this: ... that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed.[13]

8. *Tej Kiran* v. *Sanjiva Reddy*, A.I.R. 1970 S.C. 1573, 1574, para 8.
9. *C.K. Daphtary* v. *O.P. Gupta*, (1971) 1 S.C.C. 626, 645, 646, para 68.
10. Art. 105 (2), Constitution of India.
11. *Id.*, art. 361A.
12. (1892) 1 Q.B. 431.
13. *Id.* at 451.

Statements made in the course of judicial and quasi-judicial proceedings are, in the United Kingdom absolutely privileged.

In India, it has been recognised that public policy requires that judges, counsel and witnesses should be able to make their statements in judicial proceedings without fear of being exposed to legal consequences.[14] The privilege is absolute in its character.[15] It is essential in all courts that the judges should be permitted to administer justice under the protection of law independently and freely without favour and fear. The provision of law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest mandates the judges[16] to exercise their functions with independence and without fear of consequences. Absolute privilege exists in favour of statements made in judicial proceedings by –

(a) judges,[17]

(b) witnesses,[18]

(c) counsel,[19] and

(d) parties.[20]

In an Allahabad case,[21] even a magistrate who had used the words "dishonest, liar, foolish and pest of Aligang" was held to be absolutely protected.

It should be noted that in India, the Judicial Officers Protection Act, 1850 confers immunity on judicial officers for acts done judicially. Although not specifically designed for liability for defamation, its terms are wide enough to give immunity from such liability.[22]

There is an absolute privilege to parties,[23] witnesses[24] and counsel also, for words spoken in the court including statements in affidavits.[25] The principle here is that witnesses giving evidence should not have before their eyes the fear of being harassed by a suit for damages. The only fear should be that of being prosecuted for perjury if the witnesses give false evidence.[26]

---

14. *Purshottam Lal* v. *Prem Shanker*, A.I.R. 1966 All. 377.
15. *Satish Chandra* v. *Jagat Chandra*, A.I.R 1974 Cal. 266, paras 21-22.
16. *Raman Nayar* v. *Subramanya Ayyan*, I.L.R. 17 Mad. 87 (1894).
17. *Ibid.*
18. *In re Alraja Naidu*, I.L.R. 30 Mad. 222 (1906).
19. *Sullivan* v. *Norton*, I.L.R. 10 Mad. 28, 35 (1886).
20. *Pachaiperumal Chettiar* v. *Dasi Thangam*, I.L.R. 31 Mad. 400 (1908).
21. *Jagannath Prasad* v. *Rafat Ali Khan*, A.I.R. 1934 All. 827.
22. *Teyen* v. *Ram Lal*, I.L.R 12 All. 115 (1890).
23. *Brijlal Prasad* v. *Mahant Laldas*, A.I.R. 1940 Nag. 125 (complaint).
24. *Nannu Mal* v. *Ram Prasad*, A.I.R. 1926 All. 672.
25. *Ali Mohammad* v. *Manna Lal*, A I.R. 1929 All. 972, following *Seman* v. *Methercliff*, 46 L.J.C.P. 128.
26. *Ganesh Dutt Singh* v. *Mungneeram*, 11 Beng. L.R. 321 (P.C.) (1873).

Some controversy exists amongst[27] the High Courts as to how far a statement made to the police is privileged.[28] For the present purpose, it is not necessary to embark upon a detailed discussion. The preferable view seems to be the narrower one that there is no absolute privilege.[29] This is in harmony with a Privy Council decision[30] (not on appeal from India), that the occasions where there is absolute privilege are strictly numbered.

Tribunals

The question how far the tribunals (other than traditional courts) are entitled to absolute privilege in the context of civil liability for defamation has been debated more than once in England,[31] Canada[32] and in India.

A decision of the question seems to depend on the facts of each case. The important Indian rulings[33] on the subject, show that much depends on the status, composition and functions of the tribunal and other factors concerning it. There is a Privy Council decision[34] on appeal from Canada holding that the doctrine of absolute privilege extends to "tribunals exercising functions equivalent to those of an established court of justice."[34a]

It is believed that in this context, inquiries which are merely administrative may not enjoy absolute protection,[35] and this would be so even if there is a duty to act judicially.[36] Where the inquiry is merely for the purpose of judging the conduct of a police *patel*, a *mahalkari* holding a preliminary inquiry in order to report to the collector about the conduct of the police *patel* is not a tribunal enjoying the privilege of a court of justice in relation to the law of defamation.[37] In contrast, a tribunal constituted under the Bar Council Act was held to be entitled to absolute privilege.[38] Similarly, an officer acting under section 75 of the Madras Estates Land Act (1 of 1908), empowered to carry out the division or appraisement was held to be entitled to the protection. It was held :

---

27. See the case law reviewed in *V. Narayana Bhat* v. *E Subbanna Bhat*, A.I.R. 1975 Knt. 162.
28. Also see *Surendra Nath* v. *Bageshwari Prasad*, A.I.R. 1961 Pat. 164.
29. *Gangappagouda* v. *Basayya*, A.I.R. 1943 Bom. 167.
30. *William Francis* v. *Gordon*, A.I.R. 1935 P.C. 3, 4.
31. *Supra* note 12.
32. *Supra* note 30.
33. *Gangappagouda* v. *Basayya*, *supra* note 29; *Govind* v. *Gangadhar*, A.I.R. 1944 Bom 246; *Surendranath* v. *Bageshwari*, *supra* note 28; *Purshottam Lal* v. *Prem Shanker*, *supra* note 14.
34. *O'Connor* v. *Waldron*, (1935) A.C. 76.
34a *Id.* at 81. See further *Addis* v. *Crocker*, (1960) 2 All E.R. 629.
35. *Supra* note 28 (complaint to S.P.).
36. *Supra* note 14 (inquiry by bank manager).
37. *Supra* note 29, following *William Francis* v. *Gordon*, *supra* note 30.
38. *Govind* v. *Gangadhar*, *supra* note 33.

> In a certain event, in regard to matters which are within the province of the officer, formality attaches to his decision . and it is futile to contend that his duty is merely ministerial.[39]

Official Statement

As regards category (d) of absolute privilege (official statements), the rule in the United Kingdom has been stated by the Court of Appeal in a leading case[40] in which the plaintiff was a captain in the Indian Staff Corps. He had sued for damages for libel in respect of a statement made by the Secretary of State for India to the Parliamentary Under Secretary for India to enable a question to be answered by the latter in the House of Commons. It was observed :

> If an officer of state were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly be against the public interest, and prejudicial to the independence necessary for the performance of his functions as an official of state. Therefore the law confers upon him an absolute privilege in such a case.[41]

This principle has generally been followed in India. A resolution of the government on an official matter is absolutely privileged. If *prime facie* an official communication is privileged no allegation of malice would be allowed and no proof of malice will take away the privilege.[42]

A Bombay decision on the subject of official communications seems to treat the situation as one of qualified privilege.[43] It holds that the report of a subordinate officer to his superior on a matter within his official duty is protected in the absence of malice. The fact that the report was made in order to get a licence for possession of arms (issued in favour of a particular person) is immaterial and the fact that the report was made by the subordinate officer of his own is also immaterial provided no malice is proved. Such communication made in the discharge of public duties, it was held, was not actionable in the absence of malice.

One point of detail which has been discussed in the United Kingdom and also in Australia might some day become relevant in India also. At what level

39. *Duraiswami* v. *Lakshmanan*, A.I.R. 1933 Mad 537 at 539.
40. *Chatterton* v. *Secretary of State for India in Council*, (1895) 2 Q.B. 189.
41. *Id.* at 191 (per Lord Esher, M.R.).
42. *J.M. Cursetji* v. *Secretary of State*, I.L.R. 27 Bom. 189, 216 (1903).
43. *Narasimna* v. *Balwant*, I.L.R. 27 Bom. 585, 588, 589 (1903).

does the protection apply? There is a decision of the High Court of Australia[44] in which Evatt, J., held that absolute privilege is not attached to a report from an inspector of police to his superior officer concerning a subordinate. It has been stated:

> Absolute immunity from the consequences of defamation is so serious a derogation from the citizen's right to the State's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cut across this elementary right of civil protection, and any extension of the area of immunity must be viewed with the most jealous suspicion and resisted unless its necessity is demonstrated.[45]

Report of Judicial Proceedings in Newspapers

Category (e) (reports of judicial proceedings in newspapers) enjoys in the United Kingdom absolute privilege by statute. Section 3 of the Law of Libel Amendment Act, 1888 read with section 8 of the Defamation Act, 1952 provides that a fair and accurate report, *in any newspaper*, of proceedings of cases publicly heard before any court exercising judicial authority within the United Kingdom shall, if published contemporaneously with such proceedings, be privileged, provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter. The statutory privilege in the United Kingdom will obviously extend to all who take part in the publication.

In India, the Press Commission, after referring to section 8 of the Defamation Act, 1952, recorded the following conclusion on the subject :

> The privilege spoken of here is absolute privilege. We recommend that this provision be enacted in India, but dropping the proviso regarding "any blasphemous or indecent matter."[46]

The common law seems to have recognised only a qualified privilege for fair and accurate reports of judicial proceedings.[47] Where the privilege exists at common law, it seems clear that it extends to reports *other than those in newspapers*—for example, to reports in letters or in conversation. At the present day, the defence has to be considered in the light of the fact that most reports which are published (in the media) of proceedings in Parliament, or in the courts or elsewhere, do not purport to be a full account, or even a precis, of the whole proceedings, but are selective and concentrate on those aspects of the proceedings which are thought to be of particular interest to the public. According to Duncan and Neill, short reports of this kind, or reports in the

44. *Gibbons* v. *Duffell*, 47 C L.R. 520. (1932)
45. *E.E. Williams*, 25 *L.Q.R.* 200 quoted by Evatt, J., in *Id* at 534.
46. *Second Press Commission Report*, vol. 1, p. 44, para 72 (1982).
47. See *Webb* v. *Times Publishing Co. Ltd.*, (1960) 2 All E.R. 789; *McCarey* v. *Associated Newspapers Ltd* , (1964) 2 All E.R. 335.

name of sketches, will be protected provided they are neither inaccurate nor unfair to the plaintiff.[48]

Legal Adviser

Category (f) relating to communications between a legal adviser and his client does not seem to require much discussion.

Privileges of Newspapers

The next point to be examined concerns the privileges of newspapers. In the United Kingdom, before 1952, publication in newspapers enjoyed certain privileges under the statutory provisions then in force. But those provisions were found to be insufficient, in two respects—

(i) the provisions were limited to "newspapers" as defined in the statutory provisions, whereunder the *maximum interval* that could intervene between the publication of any two issues of a newspapers should not exceed 26 days;

(ii) while reports of certain proceedings, *i.e.*, proceedings of certain bodies, were privileged if published in newspapers, it was felt that the list of these proceedings had become out of date.[49]

It was further considered that changes in social and administrative conditions, and the increasing interest in foreign affairs, had rendered some of the categories of privileged proceedings inadequate.

Porter Committee Report

The Porter Committee took note of both the aspects mentioned above, and recommended suitable changes in the law.

As to the first, it recommended an enlargement of the definition of "newspaper", so as to increase the interval of 26 days; and as to the second, it recommended enlargement of the categories of reports of proceedings that were to be privileged if published in newspapers.[50]

Both these recommendations have, in substance, been carried out by the Defamation Act of 1952. Section 7 (5) of the Act contains a changed definition of "newspapers". Sections 7 (1) to 7 (4), read with the Schedule to the Act, enlarge the categories of reports in newspapers and confer upon them

48. Duncan & Neill, *supra* note 1 at 109, para 14.29.
49. *Porter Committee Report*, para 106.
50. *Ibid.* Summary of Recommendations No. 7; see also body of the report, paras 95-103 (definition of newspapers) and paras 104-111 (categories of reports.).

a qualified privilege. The qualified privilege is a wide one in respect of reports listed in part I of the Schedule to the Act, in the sense that these reports are privileged without the need for explanation or contradiction. The qualified privilege, however, is subject to an explanation or contradiction in the case of reports enumerated in part II of the Schedule to the Act.

These matters require consideration in India also. It would, however, appear that if the English provision is to be adopted the retention of the word "indecent" is desirable, (if at all there is need for a legal provision on the subject). Any privilege to be conferred in the realm of defamation should not be construed as conferring also a privilege to publish the publication *indecent* matter. There is also need to exclude, from such protection, matter which might constitute an offence against religion under the Indian Penal Code. (This would correspond to 'blasphemous" matter excluded from the English provision).[51]

51. S. 3, Law of Libel Amendment Act 1888.

CHAPTER 11

Qualified Privilege

ON CERTAIN occasions, the privilege enjoyed in relation to liability for defamation is not absolute, but qualified, in the sense that the defence, though available by reason of certain special circumstances, can be defeated if the plaintiff proves that the defendant was actuated by malice in publishing the words of which complaint is made as their being defamatory. An English work on defamation[1] states that the statements to which the defence of qualified privilege applies can be conveniently grouped by reference to the following categories :

(*a*) statements made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them;

(*b*) statements made for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive them;

(*c*) statements made in the protection of a common interest to a person sharing the same interest;

(*d*) fair and accurate reports of judicial proceedings, whether or not published contemporaneously with the proceedings;

(*e*) fair and accurate reports of parliamentary proceedings, and parliamentary sketches;

(*f*) extracts from parliamentary papers and public registers;

(*g*) certain reports published in newspapers or by broadcasting which are protected by virtue of the provisions of the Defamation Act, 1952,

The last three categories are statutory.

By and large, the above categories of qualified privilege, except those that are purely the creation of statutes enacted in the United Kingdom have been recognised in India also. Some of the important Indian rulings[2] on the subject do not reveal the existence of any serious problems in this regard.

---

1. Duncan & Neill, *Defamation* 98, para 14.01 (1978).
2. *R.K. Karanjia* v. *K M.D. Thackersey*, A.I.R. 1970 Bom. 424, 430, paras 8, 20. 21, *Ellappa Goundan* v. *Ellappa Goundan*, A.I.R. 1950 Mad. 409; *Sadasiba* v. *Bansidhar*, A.I.R. 1962 Orissa 115; *Khirod Ranjan* v. *Syed Mohammad*, A.I.R. 1939 Pat. 190; *Ramdas* v. *Raja*, A.I.R. 1958 Raj. 257.

The statements to which the defence of qualified privilege applies so far as the common law rules are concerned are usually grouped by reference to the following categories :

(*a*) statements made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them;

(*b*) statements made for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive them;

(*c*) statements made for the protection of a common interest to a person sharing the same interest;

(*d*) fair and accurate reports of judicial proceedings, however, published, and whether or not published contemporaneously with the proceedings.

In *R.K. Karanjia* v. *K.M.D. Thackersey*,[3] which is of particular interest to the press, it was pointed out that in order to make the occasion one of qualified privilege the existence of a duty is more important than the existence of a matter of public interest. The formulation of the principle in one of the leading English case[4] has been generally followed in India, namely, that

> a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made, has a corresponding interest or duty to receive it. This reciprocity is essential.[5]

Judicial Proceedings

On the question whether the protection conferred on fair and accurate report of judicial proceedings is absolute or qualified, an elaborate discussion is necessary.[6] The privilege is qualified at common law but absolute, where section 3 of the Law of Libel Amendment Act, 1888 applies, that is to say, where the report is published contemporaneously in newspapers. The position has been thus expounded :

> Where the privilege is conferred by statute on newspaper reports it will extend to protect all those taking part in the publication, subject of course to the question of malice where the privilege is a qualified one. Where the privilege exists at common law it seems clear that it extends to reports other than those in newspapers, for example to reports in letters or in conversation. At the present day the defence has to be considered in the

3. *Ibid.*
4. *Adam* v. *Ward*, (1917) A.C. 309 (H.L.).
5. *Id.* at 334, per Lord Atkinson.
6. See also *supra* p. 55.

light of the fact that most reports which are published in the media of proceedings in Parliament, or in the courts or elsewhere do not purport to be a full account or even a precis of the whole proceedings, but are selective and concentrate on those aspects of the proceedings which are thought to be of particular interest to the public. It is submitted that short reports of this kind, or reports in the nature of sketches, will be protected provided they are neither inaccurate nor unfair to the plaintiff.[7]

Proof of Malice

Both the defence of fair comment and the defence of qualified privilege can be defeated if the plaintiff proves that when the defendant published the words complained of, he was actuated by express malice.[8] The expression "express malice" in this context does not necessarily mean vindictiveness, but is wide enough to cover any improper motive. Lord Diplock, in a fairly recent decision[9] of the House of Lords relating to qualified privilege, contrasted the situation where the person publishing the defamatory statement does so to protect his interest or to discharge his duties (on the one hand) and the situation where he uses the occasion for some other reason (on the other hand). The contrast is brought out in the following passage :

> [I]n all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit—the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason, he loses the protection of the privilege.
>
> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial.[10]

Some of the principles relating to malice have been dealt with in *Janardan*'s case.[11] The litigation arose out of certain statements and counter-statements relating to the affairs of a trust created by the late Lokmanya Tilak and to the policies pursued by two newspapers (the *Maratha* in English and the *Kesari* in Marathi) which were started by him and later handed over to the trust. The plaintiffs were the two sons of Lokmanya Tilak who had attacked the defendant and his co-trustees in a document called "Public Declaration", whose publication was followed by the plaintiff's undertaking a fast unto death. It was in reply to the "Public Declaration" issued by the

7. *Supra* note 1 at 109, para 14.29.
8. *Id.* at 120-123 paras. 17.03 to 17.06.
9. *Horrocks* v. *Lowe*, (1974) 1 All E.R. 662.
10. *Id.* at 669.
11. *Janardan Karandikar* v. *Ramchandra Tilak*, A.I.R. 1947 Bom. 209.

plaintiff, and in avoidance of responsibility for the plaintiff's fast unto death, that the article of the defendant was published in the *Kesari*. It was this article which was the basis of the plaintiff's claim for damages for libel. Blagden, J., who tried the suit on the original side, held the statement of the plaintiff defamatory, but on appeal a Division Bench of the Bombay High Court held that the article was written on a privileged occasion and was protected, there being no proof of malice. It was held that where, in an action for libel, it is found that the alleged article was published on a privileged occasion, two questions arise for consideration:

> (1) [W] hether any portion of the offending article was outside the privileged occasion and was, therefore, not protected; and (2) if the privileged occasion covered the whole article, was there evidence of express malice.[12]

"Malice", in such cases, means any indirect motive. Motive to defend oneself is no evidence of malice. Honest belief is protected. Falsity of facts is also not necessarily evidence of malice. So also, negligence in publishing is no evidence of malice. Mere want of sound judgment is also no evidence of malice.

The Bombay judgment referred to above points to the several interesting questions that arise when a statement made on a privileged occasion is challenged as made with malice, and the proceedings also involve a dispute as to the truth or falsity of the statement. These aspects have been considered at some length by Lord Diplock in the judgment of the House of Lords.[13] The following propositions can be culled from the judgment,[14] on the question of truth and falsity of the statement :

(*i*) If the defendant did not believe that what he published was true, this fact is generally conclusive evidence of express malice. The reason is that no sense of duty or desire to protect one's own legitimate interest can justify a man in telling deliberate and injurious falsehood about another.

(*ii*) If the defendant made the publication recklessly, being indifferent as to its truth, he will be treated as if he knew it to be false. But carelessness or impulsiveness or irrationality in arriving at a positive belief in the truth of the matter published does not amount to indifference to truth in this context.

(*iii*) Even a positive belief in the truth of what is published may not be sufficient to negative express malice. The plaintiff may still be able to prove that the publication was actuated by improper motive. But in such a case where the defendant believed the words to be true, the court should be very slow to draw the inference that the sole or dominant motive was the improper one.

12. *Id.* at 215.
13. *Supra* note 9.
14. See *id.* at 669-70.

CHAPTER 12

Honest Belief in Truth as a Defence

THE DEFENCE of justification (truth) is not satisfied by merely proving that the defendant honestly believed the statement to be true. He must prove objectively that the statement was in fact true. This suggestion has been particularly pressed in the United Kingdom so as to make the position of newspapers more favourable. A report published by Justice[1], proposed that the press should be given a new qualified privilege for statements based upon information which might reasonably be believed to be true, provided that the defendant published a reasonable statement from the plaintiff by way of explanation (if so requested) and (if necessary) an apology.

But, outside Fleet Street, the *Report of Justice* has not been well received (*a*) in Parliament,[2] or (*b*) in academic writing,[3] or (*c*) by the Faulks Committee.[4]

Commenting on the recommendation of the Justice Committee,[5] Lord Lloyd whose view is of particular interest stated:

> Far and away the most important of these recommendations is that which proposes a new form of qualified privilege. What the Committee recommended is that there should be a statutory defence of qualified privilege for newspapers in respect of the publication of matters of public interest, where the publication is made in good faith without malice and is based upon evidence which might reasonably be believed to be true, provided that the defendant has published upon request a reasonable letter or statement by way of explanation or contradication and withdrawn any inaccurate statements with an apology if appropriate to the circumstances. This is an extremely far-reaching proposal, for it means that the Press would now be entitled to put out untrue statements about matters of public concern or half-truths which could be justified in subsequent legal proceedings merely on the footing that they were based upon evidence which might reasonably be believed to be true. Evidence for this purpose

---

1. Justice, *The Law and the Press* (1965) [Joint Working Party of Justice and British Committee of International Press Institute]. See also Salmond & Heuston, *Torts* 166, para 63 (1981).
2. 274 *H L. Debates*, Col. 1371.
3. Lord Lloyd, The Law and the Press, 19 *Current Legal Problems* 43 (1966); Heuston, Recent Developments in the Law of Defamation, (1966) 1 *Irish Jurist* 247 (1966).
4. *Faulks Committee Report*, Cmd. 5909,para 211 (1975).
5. *Supra* note 1 at 38, para 119.

would presumably not mean evidence which would satisfy a court of law, but which would be regarded as deserving of credence by the ordinary reasonable man, and might cover rumours which were being widely spread about, and which seemingly had a semblance of justification. One has only to think of the appalling situation of a plaintiff who is faced with statements of this kind in a newspaper and who, if this proposal became law, would be forced to fight a libel action on the basis that the defendant newspaper would not be bound in any way to prove the truth of the assertions, but would be able to subject the plaintiff in public proceedings to a barrage of all the rumours and scraps of information and other material which its great resources could lay its hands on for the purpose of trying to satisfy a jury that this was evidence which, though not true, might reasonably be believed to be true. Even if the plaintiff came through such an ordeal with flying colours, is it not virtually inevitable that, having been publicly pilloried by this welter of rumour and suspicion, his reputation would inevitably suffer, notwithstanding the successful outcome of the proceedings, on the footing that "there is no smoke without fire," quite apart from the anguish that he will have been subjected to by having to expose himself to proceedings fought in this way?

Let us just consider, for example, the case of a person in a public position about whom there are widespread rumours, entirely untrue, that he is living with a mistress, or is a homosexual. There are obviously circumstances where it would be arguable that these may be matters the publication of which would be of public interest. But a plaintiff in such a situation, who desired to put a stop to newspapers giving immense public currency to such unfounded rumours, would find himself obliged to launch proceedings and then contemplate the newspaper exerting every possible resource to bring out every episode or incident in his private life from which a jury might conceivably be persuaded that here was evidence upon which the rumoured tales might reasonably be believed to be true. The perils to which a plaintiff would be exposed by having to cope with a possible defence of this sort, if ventilated and exploited by all the resources which a vast national newspaper could command, leads one to ask what is the real foundation upon which the case is sought to be made by the Committee in favour of conferring so tremendous a new "freedom" to assail public or private reputations.

It is interesting to note in this connection that at least the more serious-minded organs of the Press appear to have had some reservations about this new proposal. For instance, *The Observer* asked this question: "Can it be right that a law should sanction spreading untruths, however much the author has tried to be truthful?"[6] and *The Times*[7] 'after remarking

6. June 37, 1965
7. June 25, 1965.

that the concept of a defence of qualified privilege is fundamentally sound, goes on to point out that the tentative definition in the Report would have to be sharpened if it were not to open the door to mischievous publication of[8] "semi-facts".[8]

There is very great force in the comment offered by Lord Lloyd, and it appears unnecessary to offer further criticism of the *Justice* proposal,

8. Lord Lloyd, *supra* note 3 at 53-55.

CHAPTER 13

Remedies in Civil Proceedings

IN GENERAL, the remedy sought for defamation in a civil action is damages. Occasionally, an injunction may be sought to prevent repetition of the libel. Of late, a few other remedies for defamation have been introduced in the legal system, or their introduction suggested.

Damages

In an action for defamation, the wrongful act is damaging to the reputation of the plaintiff. According to the Bombay High Court, the injuries that the plaintiff sustains may be classified under two heads: (*i*) the consequences of the attitude adopted towards the plaintiff by other persons, as a result of the diminution of the esteem in which they hold him, being a consequence of the publication of the defamatory statement; and (*ii*) the grief or annoyance caused by the defamatory statement to the plaintiff himself. Damages under the second head may be aggravated by the manner in which, or the motive with which, the statement was made or persisted in. The presence of the plaintiff in the witness box gives the court an opportunity (which the appellate court does not have) of forming a view of the personality of the plaintiff, whether he is a particularly sensitive man and so on and of assessing the grief and annoyance which the statement may cause him as a sort of person the court thought him to be.[1] However, where the trial court has awarded exemplary damages in circumstances in which they ought not to have been awarded, the appellate court has power and duty to interfere with the award.[2]

Cost of the litigation cannot be included in the damages to be awarded for the injury caused by a defamatory statement. Defamation is a tort, and a party suing in tort can seek only compensation for the injury sustained as a result of a tort and not cost of the action.[3]

Remedies

In recent times, considerable thought has been devoted to the question of remedies for defamation. But not many concrete points have ultimately

---

1. *R.K. Karanjia* v. *K.M.D. Thackersey*, A.I.R. 1970 Bom. 424, following *McCarey* v. *Associated Newspapers Ltd.*, (1964) 3 All E.R. 947.
2. *R.K. Karanjia* v. *K.M.D. Thackersey*, *id.* at 436, para 43.
3. *Id.* at 437, para 46.

emerged from these discussions. Only one particular point, *viz.*, right of reply, deserves notice and may now be dealt with.

Right of Reply

On the question, the right of reply, the Second Press Commission's observations were as under :

> The law of defamation in India, in common with the law of England, awards damages to redress the wrong done. It makes no use of *recompense* (droit de response) or the "right of reply" which is an important remedy in the Continental legal systems. We suggest elsewhere (in the Chapter on the Press as a Public Utility) a limited right of reply and its enforcement through the Press Council.[4]

In the chapter on "Press as a Public Utility", the Second Press Commission, by a majority (with H.K. Paranjape dissenting), recommended that for the present, the right of reply be recognised as a convention, as a part of professional ethics and a complaint alleging a denial of the right be looked into by the Press Council, as it is already doing.

It is unnecessary to go beyond what the Press Commission has recommended, at least, for the present in India. But some comparative glimpses may be useful.

In West Germany the Hamburg Press Law has the following provision regarding the right of reply which would be of interest :

> 11. (1) The responsible editor and publisher of a . . . printed work are obliged to publish the reply of a person or body concerned in a factual statement made in the work. This obligation extends to all subsidiary editions of the work in which the statement has appeared.
>
> (2) The obligation to publish a reply does not apply if the reply is disproportionate in extent. If the reply does not exceed the length of the text complained of, then it is counts as proportionate. The reply must be limited to factual statements and must contain no matter contrary to law. It must be in writing and must be signed by the person concerned or his legal representative. The person concerned or his legal representative can only demand the right to reply if the reply is sent to the responsible editor immediately and at least within three months of the publication.
>
> (3) The reply must be published in the next available issue after receipt which is not yet otherwise completely ready for printing. It

4. *Report of the Second Press Commission*, vol. 1, p. 47, para 79 (1982).
5. *Id.* at 162-163, paras 118-121. See also *id.*, Appendix X-19.
6. Hamburg Press Law, paragraph 11 (29 January 1965): see Urs Schwarz, *Press Law for Our Times* 106-107 (1966, I.P.I. Zurich).

must appear in the same section of the work and in the same type as the text complained of and without any interpolations or omissions. It may not appear in the form of a reader's letter. Publication of the reply is free unless the text complained of appeared as an advertisement. Any comment on the reply in the same issue must be restricted to factual statements.

(4) Regular legal channels are available to enforce the right to reply. On the application of the person concerned the Court may order the responsible editor and publisher to publish a reply in the form of section 3. The corresponding provisions of the Code of Civil Procedure on obtaining an interim injunction shall apply to this court procedure. It is not necessary to prove that the right has been endangered.

(5) Sections 1 to 4 do not apply to fair and accurate reports of open sessions of legislative or deliberating bodies of the Federation, the States and communities, or courts.

(6) Sections 1 to 5 apply as appropriate to the transmissions of North German Radio. The right to reply concerns the person who originated the broadcast complained of. The reply must be immediately broadcast to the same receiving area and at an equivalent transmission time to the broadcast complained of.

CHAPTER 14

Jurisdiction, Procedure, Limitation, Pleadings and Evidence

Jurisdiction

IT IS desirable to discuss, at this stage the question of the forum for defamation actions. The Press Commission considered a plea raised by certain newspaper organisations that filing of complaints against newspapers in remote places (for defamation) seriously inconvenienced them, leading to the harassment of newspapers and journalists. The Press Commission, however, did not accept this plea and expressed the view that the present position on the subject should continue. It stated :

> We do not agree with the view that proceedings for defamation against newspapers and periodicals should be initiated in the first instance in a court, civil or criminal, in the State from where the newspaper is published, as it will be discriminatory. It might well be asked why the Press should get a favour not available to other persons. Moreover, it is open to a defendant or accused to move the High Court for transfer of the case to a different court.[1]

However, continuing its consideration of the subject, the Press Commission did recommend an amendment of section 205(1) of the Code of Criminal Procedure, 1973, regarding personal appearance of the accused.

Procedure—Appearance

Addressing itself to the question of appearance of the accused in a prosecution for defamation, the Press Commission recommended as under :

> [U]nless there is a *prima facie* case of malice, the Magistrate should dispense with personal appearance of the accused. Clause (1) of section 205 of the Criminal Procedure Code, 1973, may be suitably amended, to provide that in criminal complaints for defamation, unless there is a *prima facie* case of malice, the Magistrate shall dispense with the personal attendance of the accused wherever summons is issued and permit him to appear by a pleader; but the Magistrate may not dispense with the personal attendance of the accused, where the accused is an editor, publisher or proprietor of a newspaper or periodical, if he is satisfied that the accused has unreasonably refused to publish, within a reasonable time, a reply of the complaint to the alleged defamatory publication. However, we are not proposing

1. *Report of the Second Press Commission* vol. I, p. 47, para 80 (1982).

any interference with the wide discretion of the Magistrate conferred by section 205 (2) to direct personal appearance of the accused at any subsequent stage of the proceedings.[2]

The above recommendation is worth implementing.

Limitation

Another question worth consideration relates to a shortened limitation period for the prosecution of journalists. (This question, of course, is not confined to the sphere of defamation). It is understood that in West Germany the shortened prescription on prosecution provided for press offences constitutes an important improvement in the legal position of journalists.[3] It would be useful to quote from the Hamburg Press Law:

23(1) Time limits for the prosecution of offences—

1. Committed by the publication or distribution of printed works containing offending matter; or

2. Which are otherwise penalised under this law, expire in the case of felonies after one year, and in the case of misdemeanours after six months.

3. Prescription for the prosecution of the infringements named in paragraph 21 is three months.

4. Prescription begins at the publication or distribution of the work. If the work is published or distributed in sections or re-issued, the time begins to run from the publication or distribution of the latest section or edition.[4]

The question whether India should have a similar provision is worth discussion. Under section 468 of the Code of Criminal Procedure, 1973, the limitation period is three years for a prosecution for defamation, in case of all printed works.

Pleadings

The actual words used, on which the suit for defamation is based, should be clearly set out in the plaint.[5] The plaint ought to allege not only the publication or set out not only the words but that these words were published or spoken to some named individuals at a particular time and place.[6] Where the words are *per se* or *prima facie* defamatory, only the words need be set out.

2. *Ibid.*
3. Urs Schwarz, *Press Laws for Our Times* 66 (1966, International Press Institute, Zurich).
4. Hamburg Press Law, paragraph 23 (29 January, 1965); see Urs Schwarz, *Id. at* 111.
5. *Brijlal Prasad* v. *Mahant Laldas*, A.I.R. 1940 Nag. 125; following *Nannu Mal* v. *Ram Prasad*, A.I.R. 1926 All. 672; see *Krishnarao* v. *Radhakisan*, A.I.R. 1956 Nag. 264.
6. *Krishnarao* v. *Radhakisan, ibid*; *Nannu Mal* v. *Ram Prasad, ibid.*

Where, however, the defamatory sense is not apparent on the face of the words, the defamatory meaning or (as it is technically known in law) the innuendo must also be set out in clear and specific terms. Where again, the offending words would be defamatory only in the particular context in which they were used, uttered or published, it is necessary also to set out in the plaint, and to state or aver further that this particular context or the circumstances constituting the same were known to the persons to whom the words were published, or, at least that they understood the words in the defamatory sense. In the absence of these necessary averments, the plaint would be liable to be rejected on the ground that it does not disclose any cause of action.[7]

However, the law that the plaintiff in the suit must set out the exact words by the defamer or quote the very words used by him is restricted only to the plaintiff, and cannot be extended to his witnesses. The law sets out the restriction for the plaintiff, merely for the reason that the court may be enabled to decide whether the words used are of a defamatory meaning. Once these words are precisely set down in the plaint or quoted precisely by the plaintiff in the witness-box, that would enable the court to draw out their exact meaning, and for that reason the suit will not fail merely because the witnesses have given only the gist of those words or that some of them do not remember the exact words used by the opposite party,[8]

In a criminal case of oral defamation under section 500 of the Indian Penal Code, it has been held that it is sufficient for the purpose of proving this offence, if the witnesses are agreed in a substantial measure on the words of imputation uttered as it is hardly possible, even for the most honest witnesses to reproduce every such word or expression.[9] All the same, when the question arises as to whether the words alleged to be defamatory as used were intended to harm or had the effect of harming the reputation, the court must be put in possession not only of the words used, but also of the context in which they were used, in order to find the intention and the effect of the words. If the court instead of going into the words and the context, accepts the "impression" (of the words used and of the general conversation), "left on the minds of the witnesses", it will be yielding its own duty to witnesses, with the result that the accused person will have no benefit of the opinion of the court itself[10]

There is no universal rule that accused cannot be convicted of defamation unless actual words are proved. The exact words are not material where a sufficiently clear account of the defamatory remarks are enough to find the

7. *W. Hay* v. *Aswini Kumar*, A.I.R. 1958 Cal. 269.
8. *Purshottam Lal* v. *Prem Shankar*, A.I.R. 1966 All. 377.
9. *Namjundaiah* v. *Thippanna*, A.I.R. 1952 *Mys.* 123; 1952 Cr. L.J. 1933; *Dhruba Charan* v *Dinabandhu*, A.I.R. 1966 Orissa 15.
10. *Bhola Nath* v. *Emperor*, A.I.R. 1929 All. 1; *P. Ramaswami* v. *M. Karunanidhi*, 1970 L.W. (Cr.) 245; *Ramesh Chander* v. *The State*, A.I.R. 1966 Punj. 93.

accused guilty.

Evidence

Some questions of evidence may now be dealt with. In the United Kingdom by a statutory provision of 1981, sources of information contained in publications are protected to a limited extent. Section 10 of the Contempt of Courts Act, 1981 reads as under :

> 10. No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of informaiion contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Section 2(1) of the same Act defines the expression "publication" as under :

> 2(1) . . . "publication" includes any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public.

By section 19 of the same Act, "court" is defined as including any person or body exercising the judicial power of the state.

Even before the passing of the Contempt of Courts Act, 1981, it was settled in the United Kingdom, that in interlocutory proceedings (*i.e.* proceedings preparatory to the hearing of a civil action), an interrogatory could not generally be served requiring a newspaper, when sued for libel, to reveal the source of information. Thus, it has been held[11] that in an action for libel, a newspaper could not be required to reveal its source where fair comment was pleaded as a defence. Again, the Court of Appeal would not allow a sports writer to be required to reveal his source, where "justification" was pleaded in an action for damages for libel.[12]

These judicial decisions on interrogatories in libel actions are now embodied in the Rules of the Supreme Court. The relevant rule is as follows :

> In an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment on a matters of public interest or were published on a privileged occasion, no interrogatories as to the defendant's sources of information or grounds of belief shall be allowed.[13]

11. *Lyon* v. *Daily Telegraph*, (1943) 1 K.B. 476: (1943) 2 All E.R. 516 (C.A).
12. *Lawson* v. *Odhama Press, Ltd.*, (1949) 1 K.B. 129: (1948) 2 All E.R. 717 (C.A.); For extensive references, see Gatley, *Libel and Slander*, para 1216 (1981).
13. 0.82 R. 6, R S C. (Eng).

In libel suits, courts in the United States have also refused (on First Amendment grounds) to order the disclosure of a defendant's confidential news sources, except in the unusual circumstances in which (*a*) the plaintiff has demonstrated a substantial likelihood that disclosure will lead to persuasive evidence on the issue of liability, and (*b*) alternative sources have been exhausted.

The Eighth Circuit,[14] for example, has held that the reporter of *Life* did not have to reveal the confidential source of allegedly libellous statements about the organized crime connections of a mayor. In the above case the mayor was suing *Life* for libel. The Supreme Court declined to review this case and the decision of the Eighth Circuit was allowed to stand.[15]

Only one federal appellate court in the United States has ordered a libel defendant to disclose the identity of a confidential news source. That case arose out of a Jack Anderson column reporting on the United Mine Workers and its general counsel, Edward Carey.[16] The court emphasised that it was not establishing a general rule applicable to all libel defendants, but rather was limiting its decision to order disclosure to the extraordinary circumstances before it. The court ordered disclosure because the statement alleged to be libellous was based *entirely* on confidential sources and the plaintiff had no way of proving either falsity or recklessness without knowledge of the identity of those sources. The court stressed its agreement with the rule applied by the Eighth Circuit in *Cervantes* case,[17] that a libel defendant may not be constitutionally required to disclose the identity of confidential news sources, except when the information obtained from the source is the sole basis for the allegedly libellous statements. The U.S. Supreme Court never had to consider this case, because the source released Anderson aide Brit Hume from his pledge of confidentiality.

These sophistications need not be borrowed in India.

14. *Cervantes* v. *Time Inc.*, 464 F. 2d 986 (8th Circuit 1972), *Certiorari* denied. 409 U.S. 1122. (1973).

15. See also Howard Simmons and Joseph A Califano, Jr. (ed), *the Media and the Law* 16 (1976). For other developments, see Martin E. Lindberg, Source Protection in Libel Suits After *Herbert* v. *Londo*, 81 *Columbia Law Rev*, 338-365. (1981)

16. *Carey* v. *Hume*, 492 F. 2d 631 (D.C. Cir. 1974). *Certiorari* dismissed, 417 U.S. 938 (1974).

17. *Cervantes* v. *Time Inc.*, *supra* note 14.

CHAPTER 15

Survival of Causes of Action for Defamation

THERE ARE certain anomalies in the present Indian law as to the survival of causes of action after the death of the person wronged or of the wrongdoer. The anomaly is of particular relevance to defamation. The matter is primarily governed by section 306 of the Indian Succession Act, 1925. It reads as under :

> 306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.
>
> **Illustrations**
>
> (i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.
>
> (ii) A sues for divorce. A dies. The cause of action does not survive to his representative.

It should be noted, at the outset, that in Kerala,[1] a state Act contains provisions, *inter alia*, relating to the survival of causes of action and expressly repeals section 306 of the Indian Succession Act by providing that section 306 of the Succession Act so far as it relates to the right of *action in torts*, shall cease to apply in the State of Kerala. The Act seems to re-enact an earlier Travancore Act[2] on the subject.

Consideration of section 306 of the Indian Succession Act may begin with the maxim—personal action dies with the person. Although somewhat obscure in its origin, the principle that a personal cause of action dies with the person seems to have been linked with the criminal flavour of early tort remedies.[3]

---

1. Kerala Torts (Miscellaneous Provisions) Act, 1976 (8 of 1977): (1977) K.L.T. Statutes 37-39.
2. Travancore Law Reform (Miscellaneous Provisions) Act (12 of 1924).
3. See Fleming, *Torts* 695 (1965).

The maxim was originally introduced to prevent *actions of a penal character*, like trespass and its offshoots, from being brought after the *death of the wrongdoer* against his representatives.[4] The main reason was that the trespass was "drowned in the felony". Later, however, the maxim was applied to cases of death of the injured person, even though the reason[5] underlying the maxim had no application.[6]

Thus, the wide scope that the rule came to acquire was more a product of the accidents of history, than of any deliberate view taken as a matter of policy.

On principle, there is hardly any justification for not allowing survival of the cause of action for defamation.

Value of Reputation

By many, reputation is regarded as even more precious than life. Indian literature has beautiful sayings on the subject.[7] It may be mentioned that article 12 of the Universal Declaration of Human Rights has also recognised the increasing importance of reputation. It provides :

> 12. No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, *nor to attacks upon his honour and reputation*. Everyone has the right to the *protection of the law* against such interference or attacks.

It may also be mentioned that the principle that the cause of action for defamation should survive has been approved by the Faulks Committee.[8]

Editors of several leading books on torts have criticised the exclusion of defamation from the category of causes of action that survive under the Law Reform (Miscellaneous Provisions) Act, 1934. Salmond has stated : "Defamation may cause much more harm to the next of kin than an assault."[9] According to Winfield :

> [T]he exclusion of defamation . . . from the provision of the Act of 1934 is hard to justify. Not only does the victim of a libellous attack lose his right to damages if his defamer dies, but he also loses the opportunity of vindicating his character in a court of law.[10]

The above material clearly points to the need for amendment of the law as contained in section 306 of the Indian Succession Act.[11]

4. Holdsworth, 3 *History of English Law* 576. See also Street, *Torts* 307 (1977).
5. Death of Wrongdoer in case of penal action.
6. *Admiralty Commissoners* v. *S.S. Amerika*, (1917) A.C. 38, 43, 44.
7. *E.G Bhagvadgeeta*, ch. 2, verse 34.
8. *Report of Committee on Defamation* 116, para 423 (1975).
9. Heuston (ed.), *Salmond on Tort* 451,f.n.49 16th ed. (1973). Also Salmond and Heuston, *Torts* (1981). 416 f.n.57.
10. J.A. Jollowicz and Ellis Lewis (ed.), *Winfield on Tort* 627 (1967).
11. *Supra* p. 72.

CHAPTER 16

Criminal Law : Section 499, Indian Penal Code

THE CRIMINAL law of defamation in India is codified, and is enumerated in section 499 of the Indian Penal Code.

An aggrieved person has both the remedies—civil and criminal.[1] He is not compelled to make a choice between the two. If he has filed a criminal prosecution, he can still file a civil suit for damages for defamation, even though the prosecution is still pending. In fact, if he waits too long, the civil action may become time-barred. Withdrawal of a criminal complaint on tender of apology is no bar to civil action for libel unless there is a specific agreement barring a civil action.[2]

Defamation as an offence is dealt with in section 499 of the Indian Penal Code. The main paragraph of the section defines what is "defamation". In essence, it is an action causing harm to the reputation of a person, by making an imputation. Two explanations to the section (the first and second) deal with defamation of a deceased person and defamation of a group of persons, respectively. The third explanation to the section deals with an imputation in the form of an alternative, or expressed ironically. The meaning of "harm to reputation" is dealt with in the fourth explanation.

Definition of Defamation

Coming to the definition, a person commits defamation when, by words either spoken or intended to be read, or by signs or by visible representations, he makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm, the reputation of such person—unless the case falls within one of the exceptions. As a point of comparison, it will be noted that in civil law, the tort of defamation consists in the publication without lawful justification of a false statement, tending to lower a person in the estimation of right thinking people generally, or tending to make them shun or avoid him; briefly, defamation is a statement tending to bring a person into hatred, ridicule or contempt. The element of ridicule, though not mentioned in the main paragraph of section 499, is dealt with in the fourth explanation to the section.

1. *Asoke Kumar* v. *Radha Kanto*, A.I.R. 1967 Cal. 178 at 183, para 20.
2. *Govinda Charyulu* v. *Seshagiri Rao*, A.I.R. 1941 Mad. 860 at 861.

Deceased Persons and Groups

Imputing anything to a deceased person may amount to defamation if it would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or other near relatives. An imputation concerning a company or an association or collection of persons as such may also amount to defamation.

The first explanation dealing with defamation of the deceased, is of great interest. The two parts of the first explanation to section 499 are to be read together. The imputation must not only harm the reputation of the deceased person concerned if living, but must also be intended to be hurtful to the feelings of the members of his family or other relatives.[3]

Harming Reputation

The meaning of "harming a person's reputation" is explained in the fourth explanation to section 499. The imputation must directly or indirectly, in the estimation of others,—(*a*) lower the moral or intellectual character of that person, or (*b*) lower the character of that person in respect of his caste or of his calling, or (*c*) lower the credit of that person, or (*d*) cause it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful. The meaning of this explanation was spelt out in a Calcutta case[4] by Lahiri, J., as under :

> In my opinion this explanation does away with much of the fine distinctions under the English law and seems to imply that what constitutes defamation has to be determined not upon an interpretation that may be found for a word by a laborious research in a court of law, but upon the meaning that might be conveyed by the word to a reasonable and fair-minded man. I am prepared to concede that a meaning that might be conveyed to a morbid or suspicious mind cannot be taken into account for this purpose. The word 'others' in the explanation refers in my opinion to a reasonable and fair-minded man and not to a man with a morbid or suspicious mind.[5]

The explanation speaks *inter alia* of "caste".

So long as caste prevails, an attempt to minimise or ignore existing sanctions is contrary to the public good. If a person is really out-casted, a statement to the members of the brotherhood that he was out-casted is the kind of statement contemplated by the expression for the public good.[6]

---

3. *N.J. Nanporia* v. *Brojendra Bhowmick*, (1975) 79 C.W.N. 531.
4. *Debajyoti Burman* v. *The State*, I.L.R. (1957) 2 Cal. 181.
5. *Id.* at 191.
6. *Umed Singh* v. *Emperor*, A.I.R. 1924 All. 299 at 301 (case of slander) (per Walsh, J.).

Concept of Good Faith

Coming to the exceptions to section 499, the first observation to be made is that most of them require "good faith". The definition of "good faith"[7] in the Indian Penal Code provides that nothing is said to be done or believed in good faith which is done or believed without due care and attention. The definition in the code seems to *super-impose* the concept of due care and attention on that of honesty of purpose. In other words, honesty of purpose is certainly required. In addition, due care and attention must also be present in order to constitute good faith. The element of good faith is of particular importance to persons engaged in the profession of media. To illustrate this, two decisions may be cited. In a case which went upto the Privy Council,[8] the accused, the editor of a newspaper, published an article alleging that the district magistrate, in discharging a military officer for the offence of rape, had committed a breach of trust and was unworthy of the position he held. In fact, the Lieutenant Governor of the Province had exonerated the district magistrate; and the editor did not produce any fresh information on the basis of which he had made the allegation. Hence the plea that the publication was made in good faith did not succeed. In the second case which is comparatively more recent,[9] there was a reckless comment in a newspaper article that "the prosecuting staff at Aligarh" was corrupt. No instances of bribery had been cited, and good faith was, therefore, held to be absent.

Another general point concerning the exceptions to section 499 may be noted, namely, that the exceptions are exhaustive and no exception derived from English law or from any other source may be engrafted thereupon.[10] Of course, besides the specific exceptions given in the section, account must be taken of the general exceptions to criminal liability given in the code.[11] For example, if a person is, by threats of instant death, forced to make a defamatory statement, he is immune from criminal liability under one of the general exceptions.[11a] An important exception, previously dealt with in a central Act which had a fluctuating history and which is now incorporated in the Constitution, protects statements made by way of publication of proceedings of Parliament and state legislatures,[12] provided there is no malice.

Parliamentary Proceedings

Further, the Constitution, in articles 105 and 194, protects statements

7. S. 52, I.P.C.
8. *Channing Arnold* v. *King-Emperor*, A.I.R. 1914 P.C. 116.
9. *Sahib Singh* v. *State of U.P.*, A.I.R. 1965 S.C. 1451 at 1467, para 11.
10. *Satish* v. *Ram*, A.I.R. 1921 Cal. 1. See also *infra*, p. 78.
11. Ss. 76 to 106 of the I.P.C.
12. *Id.*, s. 94.
13. Art. 361A, Constitution of India, inserted by the Constitution (44th Amendment Act with effect from 20 June, 1979.

made by members during the course of proceedings in Parliament or legislature.[14] Malice does not take away this protection (for members of Parliament, *etc.*). But it would take away the protection for publication *outside Parliament*, *etc.* of the concerned proceedings, since the protection for such publication is, under the Constitution,[15] dependent on absence of malice.

Exceptions

The ten exceptions to section 499 of the Indian Penal Code, protect the following classes of statements from criminal liability for defamation. They are briefly stated and analysed below :

First exception : True statement made or published for the public good.[16]

Second exception : Opinion expressed in good faith respecting the conduct of a public servant in the discharge of his public functions or respecting his character, so far as his character appears in that conduct, and no further

Third exception : Opinion expressed in good faith respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Fourth exception : Publication of a substantially true report of the proceedings of a court of justice or of the result of any such proceedings. [Such publication may, however, constitute some other offence under a statutory provision regulating the reporting of judicial proceedings].

Fifth exception : Opinion expressed in good faith respecting the merits of any case decided by a court of justice or respecting the conduct of any person as a party, witness or agent in any such case or respecting the character of such person, so far as his character appears in that conduct, and no further.

Sixth exception : Opinion expressed in good faith respecting the merits of any performance which its author has submitted to the judgment of the public or respecting the character of the author, so far as his character appears in such performance and no further.

Seventh exception : Censure passed in good faith on the conduct of a person by a person having authority over him (conferred by law or arising out of a lawful contract) where the conduct is in matters to which such lawful authority relates.

Eighth exception : Accusation preferred in good faith against any person to one who has lawful authority over that person with respect to the subject matter of the accusation.

---

14. *Cf. Tej Kiran* v. *Sanjiva Reddy*, A.I.R. 1970 S.C. 1573 at 1574.
15. Art. 361A, Constitution of India.
16. Good faith is not required under the first exception, but truth is; contrast the ninth exception where truth is not required, but good faith is.

Ninth exception : Imputation on the character of another made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.[17]

Tenth exception : Caution conveyed in good faith to one person against another and intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

In India, in criminal cases, questions of privilege (in a prosecution for defamation) are determined exclusively by the provisions of the Indian Penal Code. Accordingly, an oral statement made by an accused person before the court carries only a qualified privilege under the ninth exception to section 499 of the Indian Penal Code.[18]

Belief is not a basis of privilege. For example exception 9 to section 499 cannot be read as meaning that if the person making the imputation *believes in good faith that he has been acting* for protecting his interest, then he is not liable. The interest must exist, objectively and not merely in the mind of the accused. The expression "good faith" used only once in the exception is used in connection with an act.[19]

Retention of Criminal Liability for Defamation

The question whether criminal liability for defamation should be retained has been widely debated in the United Kingdom but ultimately the offence of criminal libel, in so far as it punishes defamatory libel, continues still to be punishable in the United Kingdom. It may, of course. be mentioned that in the United Kingdom where a newspaper is proposed to be prosecuted for libel, it is necessary to obtain the permission of the judge in chambers by virtue of a specific statutory provision meant for newspapers.[20] Lord Shawcross has been one of the strong advocates of abolishing criminal liability for libel altogether, or of allowing a right of appeal against the decision of a judge to grant leave for a libel prosecution against a newspaper.[21] But no such amendment of the law has been carried out. In fact, strong views have been expressed in the United Kingdom against proposals for abolition of the offence.

In an editorial in the *London Times*,[22] it was suggested that criminal libel ought to be restricted to cases where it creates a risk of breach of the peace. But the suggestion has not been accepted in the United Kingdom. Against the

17. Truth is not required, but good faith is; contrast the first exception.
18. *Champa Devi* v. *Pirbhu Lal*, A I.R. 1926 All. 287.
19. *Bhola Nath* v. *Emperor*, A.I.R. 1929 All. 1, 8.
20. S. 8 of the Law of Libel Amendment Act, 1888.
21. Lord Shawcross, article in *The Times*, 26th May, 1977.
22. Leading article, *The Times*, 15 May, 1977, referred to by J.R. Spencer, The Press and the Reform of Criminal Libel in Glazebrook (ed.), *Reshaping the Criminal Law* 266-284 (1978).

point of view made in the suggestion in the *London Times* editorial, it could be argued that deliberate character assassination and the wild dissemination of defamatory matter by cranks, are surely evils worth suppressing, whether or not the person defamed is likely to resort to unlawful violence by way of retaliation.

It should also be pointed out that there are practical reasons for continuing the offence of defamation on the statute book, not the least of these being the consideration that attempts at character assassination have to be checked by effective means. These are purposeful attempts to harm people by spreading deliberate lies about them. In most civil law countries, it may be mentioned, defamation is primarily a matter for criminal law, and only secondarily a civil action.[23]

First Exception

What is known as the defence of "justification" in the context of the law of defamation is dealt with in the first exception to section 499 of the Indian Penal Code, which provides as under :

> It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

It needs to be pointed out that this exception imposes two conditions to be satisfied by the defamatory statement, if it is to receive the protection of the law. In the first place, the imputation must be true[24] and, secondly, the making or publication of the imputation should be for the public good. In this respect, the position differs in criminal and civil law, respectively. Immunity from civil liability for defamation exists, once it is proved that the statement is substantially true.[25] "Public good" is not an essential element for immunity in civil liability—unlike the position as regards criminal liability.

An Allahabad case however takes a wide view of the exceptions to section 499.[25a] In an application before a magistrate for the appointment of a *Mukhia*, there was a statement made that a particular person was of "bad character" and "a previous convict". He complained of defamation. The defence of truth was put forth. No previous conviction was proved against him, though it was proved that he had committed adultery with his sister-in-law, by whom he had also an illegitimate child. It was held that the offence of adultery under section 497 of the Indian Penal Code was a serious criminal

23. See J.R. Spencer, *ibid*, Stromholm, *Right of Privacy and the Rights of the Personality* 132, para 82 and p. 154, para 101 (1967).

24. *Chandrasekhara* v. *Karthikeyan*, A.I.R. 1964 Kerala 277 (creating a doubt is not enough)

25. Duncan & Neill, *Defamation* 55, para 11.03 (1978).

25a. *Emperor* v. *Murat Singh*, A.I.R. 1934 All. 904, 905.

offence, and, therefore, even if there was a statement about conviction which was not literally established, the evidence showed that he ought to have been convicted under section 497, thus indicating that the statement was substantially true. Therefore, the exception was held to be applicable.

It is also to be noted that the exception under discussion does not require good faith as an essential condition of the immunity. This is presumably for the reason that the requirement of public good may be regarded as sufficient enough to justify the publication of a true (though defamatory) statement.[26]

Concept of Public Good

The concept of public good, it should be noted, is not confined to the first exception. It appears in express terms in the ninth and tenth exceptions to the section also. In a sense, it may be said to underlie some of the other exceptions to section 499 also, such as the second, fourth and fifth exceptions, relating respectively to statements concerning the public conduct of public servants, publication of reports of judicial proceedings and comments on the merits of a case decided in court and the conduct of witnesses and others concerned in relation to that case. In fact, in the law of obscenity, section 292 of the Indian Penal Code as amended in 1969, contains an exception whereunder the section does not extend to—

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure

(*i*) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern.

Regarding the ingredient of truth, required by the first exception to section 499 two propositions are worth nothing :

(*i*) on the one hand, where truth is set up as a defence, it must extend to the entire libel,[27] and (*ii*) on the other hand, truth of the allegation need not be literally proved. It is enough if it is substantially proved.[28]

However, if there is a doubt whether the matter in question is true or not, there is no protection.[29]

In a case[30] the Allahabad High Court, while dismissing the plea of justification on the facts, described it as a "dangerous plea". Its observations are

26. At common law, truth was not a defence in criminal proceedings for libel. S. 6 of the Libel Act, 1843 made the change (by requiring truth and public benefit).
27. *Chandrasekhara Pillai* v. *Karthikeyan*, *supra* note 24 at 283.
28. *Labouchere* : 14 Cox 419, cited by Gaur, *Penal Code* 4080, para 24, (1973).
29. *Lalmohan Singh* v. *King*, A.I.R. 1950 Cal. 339.
30. *Mohammad Nazir* v. *Emperor*, A.I.R. 1928 All. 321.

lucid and pertinent :

> The defendant in proceedings for defamation whether in a suit or under S. 500, I.P.C., is usually in a delicate and difficult position . . . . The first step to consider is what is the exact nature of the defence that can be set up. . . . The facts may be so strong that occasionally it may happen that the counsel can advise the client to "justify" . . . . That most dangerous plea should never be put forward unless there is practical certainty of success.[31]

Second Exception

The second exception to section 499 provides that it is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character so far as his character appears in that conduct and no further.

It is generally understood that the second, third, sixth and ninth exceptions to section 499 embody the defence compediously known as "fair comment."[32] So viewed, these exceptions do not cover assertions of fact, but only expressions of opinion. Facts alleged must be proved to be true. It is not enough for the accused to say that he honestly believed those facts. Comment, must be on real, and not on imagined, facts.[33]

It is also necessary to bear in mind that it is one thing to comment upon the proved act of a public servant, and another to say that he has been guilty of a particular act of misconduct or misappropriation. This is illustrated by a case from Pepsu involving the editor of the weekly *Malwa Gazette*, published from Patiala.[34]

The Madhya Pradesh High Court in a case[35] while observing that a newspaper writer should be more cautious than a private individual, deals with the requirements of the defence available under the second and third exceptions to section 499 :

(*i*) The facts (on which comment is offered) should be substantially true.

(*ii*) The comments should be fair, in the sense that they are inspired by a genuine desire on the part of the writer to serve the public interest, and not by any intention of wreaking private spite.

(*iii*) The criticism, even if called for by the facts, should be in public interest, and should not be malicious. It is for the accused to show that these requirements are satisfied.

---

31. *Id.* at 325.
32. *R. Sankar* v. *The State*, A.I.R. 1959 Kerala 100, 102, 103, para 12.
33. *Ibid.*
34. *T.G. Goswami* v. *The State*, A.I.R. 1952 Pepsu 165, 168.
35. *Purushottam Vijay* v. *State*, A.I.R. 1961 M.P. 205, 208, 210, 211, 212.

The Madhya Pradesh case involved an editorial in the daily *Indore Samachar* which imputed regional bias in the matter of granting successive extensions to an officer and his contemplated appointment as inspector general of police. The editorial was *per se* defamatory of the minister in charge of the department. However, the act of the accused was held to be within the ambit of "fair comment", and was saved by the second and third exceptions to section 499. In so holding, the High Court pointed out, it is in the public interest that anything shaky or unjust or improper in a minister's conduct should be brought to the notice of the country at large.

The concept of "fair comment" was further analysed in a Nagpur case[36] which points out that the comments must be based on facts truly stated, must not contain imputations of corrupt or dishonest motives to the person whose conduct or work is being criticised (save in so far as such imputations are warranted by the facts) and must be an honest expression of the writer's real opinion.

Second Exception as invoked by the Press

A few other cases involving newspapers have been reported under the second exception to section 499. Generally, one finds the courts pointing out that the press has no special privileges as such. There are even pronouncements that newspapers must be more cautious than ordinary persons in publishing defamatory matter.[37] It has also been pointed out that the defence of fair comment does not extend to defamatory allegations of fact. This is illustrated by an Oudh case.[38] A jail superintendent was accused by the editor of a newspaper of having ill-treated prisoners in the jail. It was emphasised by the court that the newspaper editor, accused of defamation, must show that he had reasonable grounds for believing the allegation to be true and that the person now complaining of defamation was responsible for mismanagement, and that that person could have remedied the mismanagement, but preferred not to do so, being (as was alleged) naturally disposed to cruelty.

A newspaper editor cannot publish matter which is known to be a half-truth. Thus, to say that a person has been sent to be prosecuted, when one knows that the prosecution had been ordered to be withdrawn, would be defamatory. A person publishing such an imputation cannot enjoy immunity on the ground that the imputation was made in good faith for the public good.[39]

36. *N.B. Khare* v. *M R. Massani*, A.I.R. 1942 Nag. 117, 118 (Vivian Bose, J.).
37. *T.G. Goswami* v. *The State*, *supra* note 34.
38. *Rama Rao* v. *Emperor*, A.I.R. 1933 Oudh 1, 8, 9, 10.
39. *Imperatrix* v. *B. Kakde*, I.L.R. 4 Bom 298 (1880).

Third Exception

While the second exception to section 499 is confined to the criticism of public servants, the third exception to the section embraces a much wider area of fair comment by providing that it is not defamation to express any opinion whatever respecting the conduct of *any person* touching *any public question*, and respecting his character, "so far as his character appears in that conduct, and no further".

This exception thus has a positive as well as a negative aspect. The positive aspect being concerned with the situations where the exception applies, and the negative aspect being concerned with the limitations to which the exception is subject. Besides the reported decisions, the exception itself provides an illustration elucidating its scope and limitations.

To take, first, the illustration appended below the third exception, states that it is not defamation (in a person) to express in good faith any opinion whatever respecting the conduct of another person—

(*a*) in petitioning the government on a public question

(*b*) in signing a requisition for a meeting on a public question

(*c*) in presiding or attending at such meeting,

(*d*) in forming or joining any society which invites the public support, or

(*e*) in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties in which the public is interested.

Reported decisions point out that if an occasion is privileged, it is not necessary to justify every detail provided the gist of the libel is correct. Where, in a newspaper report, the main assertion is true, mere exaggeration does not take away the privilege under the third exception.[40] An article in a newspaper which is a fair comment on public affairs and merely an expression of opinion is immune unless it is proved to be the outcome of a dishonest or corrupt motive.[41]

Limitations of the Third Exception

While these decisions illustrate the positive operation of the third exception, a few other decisions point out its limitations. In the first place, good faith is an essential ingredient of the exception (and, as defined in section 52), requires due care and attention. Therefore a writer is not justified in repeating highly defamatory statements based upon mis-statements of facts.[42]

A good deal of light is thrown upon the scope and limitations of the third exception by reported decisions relating to the liability of newspapers. There

40. *Murlidhar Jeramdas* v. *Narayendas*, A.I.R. 1914 Sind 85, 86, 87.
41. *Subroya Aiyar* v. *Kadar Rowthan Abdul Kadar*, A.I.R. 1914 Mad. 352, 353.
42. *Abbasi* v. *Emperor*, A.I.R. 1941 Sind 92, 93, 95, 96.

is, for example, an interesting case from Mysore.[43] The death of a person had become a public question. The editor of a Kannada paper *Aashavadi* published an article, expressing an opinion in respect of the conduct of the complainant touching that question. The third exception was held to apply. In the absence of a dishonest or corrupt motive, an article in a newspaper which is a fair comment on public affairs is protected, as was emphasised in a Madras case.[44] Even exaggeration is excusable, if there is no deliberate misrepresentation or suppression of facts.

However, the comment must be based on facts. A writer in a newspaper cannot invent facts. On this principle, it has been held that to assert that a certain person makes gifts to certain funds not out of motives of charity but from motives of self-advantage, would be defamatory. It would seem to make no difference that the writing is published in a newspaper. The conduct of a public man cannot be labelled as dishonest simply because the writer fancies (that) such conduct is open to suspicion.[45]

Newspapers and the Question of Good Faith

Since many of the important exceptions to section 499 require good faith as a condition of immunity, editorial good faith becomes a crucial factor in the determination of the criminal liabillty of a newspaper for defamation. This is illustrated by a Supreme Court decision of 1965.[46] The case involved a newspaper article in the *Kaliyug* of Aligarh, containing defamatory statements against public prosecutors and assistant public prosecutors. From the tenor of the article, no evidence of an object of advancing the public good was established, and there was also no evidence to show that the defamatory remarks were made with due care and attention. In the circumstances, neither the third nor the ninth exception to section 499 applied. The court, in its judgment, stressed the great power of the press in impressing the public mind.

Thus, so far as the abstract principles of liability are concerned, newspapers stand in the same position as others, and are required to comply with the essential ingredients of the statutory exception on which reliance may be placed in a particular case. However, even where, owing to non-compliance with essential ingredients of immunity, criminal liability arises, the courts can still view the matter with sympathy while considering the quantum of punishment to be awarded to newspapers. This is illustrated by a case from Travancore-Cochin, involving a paper having a rather poor circulation.[47] The case was one of complaint made by a private person for the publication of a libel containing a charge of bribery against a magistrate. The trial court had acquitted

43. *K. Balakrishna Rao* v. *Udhaya*, (1971) 1 Mys. L.J. 28.
44. *Subroya Iyer* v. *Kadar Rowthan Abdul Kadar*, *supra* note 41.
45. *Appa* v. *Maricar*, A.I.R. 1918 Lower Burma 36, 40.
46. *Sahib Singh* v. *State of U.P.*, *supra* note 9 at 1454.
47. *State* v. *Packiaraj*, A.I.R. 1951 Trav-Co 105, 107.

the accused of the offence of defamation; the government appealed against the decision to the High Court, and the appeal succeeded. However, the government was not so much interested in the punishment of the accused, as in securing a decision on a matter involving the reputation of a government officer. In the circumstances, the High Court decided to impose only a fine of one rupee. The aggrieved officer, the court observed, could still file a suit for damages, if he so desired.

The element of "due care and attention" required to prove good faith has also been elaborated in a number of cases. In the absence of reasonable care exercised before making the imputation, the exception does not apply.[48] Thus, in a Calcutta case,[49] it was held that if the accused, without making inquiries, publishes defamatory allegations against a doctor (charging the doctor with drugging a patient), he cannot claim the protection of the ninth exception to section 499, merely on the ground that the public good was involved. This illustrates the stringent requirements of the exception. The material published was flimsy; hence good faith was not proved.

Fourth Exception

To come now to the fourth exception to section 499, it provides that it is not defamation to publish a substantially true report of the proceedings of a court or of the result of any such proceedings. The explanation to the exception provides that a justice of the peace or other officer holding an inquiry in open court preliminary to a trial in a court of justice is a "court" within the meaning of the above exception. The practical importance of the explanation is almost nil, since commitment proceedings are now formal in character.

It has been held[50] by the Calcutta High Court that it is not necessary under this exception that the proceedings of the court should be published contemporaneously. Further, the publication need not be true word by word, but should give a substantially true account of the proceedings. Finally, good faith is not an ingredient of the exception. The Calcutta decision is, of course, correct on the wording of the exception as it stands. However, since it is not necessary that the proceedings should be published contemporaneously (even a delayed publication would be protected), and "good faith" is also not an essential ingredient of the exception,[51] the present position does leave some scope for raking up old trials which led to the conviction of a person in the distant past, with the result that even after the episode is over and the proceedings have no topical interest at all, one can publish accounts of such trials after years and thereby damage the reputation of the convicted person. In some countries, such a

48. *Ibid.*
49. *Superintendent & Remembrancer of Legal Affairs* v. *P.C. Ghosh*, A.I.R. 1924 Cal. 611, 614.
50. *Annada Prosad* v. *Manotosan Roy*, A.I.R. 1953 Cal. 503, 504.
51. *Ibid.*

situation is taken care of by allowing an action for violation of privacy. In India, it is not, in the present position, possible to seek such relief.[52]

Fifth Exception

While the fourth exception to section 499 is concerned with the factual reporting of proceedings before a court the fifth exception deals with comments expressed on the merits of a case which has been already decided in a court or comments relating to the conduct of parties and witnesses in any such case. It is not defamation to express in good faith any opinion whatever respecting—

(*a*) the merits of any case, civil or criminal, which has been decided by a court, or

(*b*) the conduct of any person as a party, witness or agent, in any such proceeding, or

(*c*) the character of such person, so far as his character appears in that conduct, and no further.

Two illustrations to the exception elucidate its scope and limitations. Illustration (*a*), which relates to comment on the conduct of a witness, states that a statement that the evidence of a person at the trial "is so contradictory that he must be stupid or dishonest", if made in good faith, is within the exception, since it is an opinion expressed respecting that person's character as it appears in his conduct as a witness, and no further. In contrast with this, illustration (*b*) to the exception states the case where the statement made is : "I do not believe what Z asserted at the trial, because I know him to be a man without veracity". To this case, the exception does not apply because the opinion expressed about the character of Z is not founded upon *his conduct as a witness*. In such a case, the opinion has already been formed and precedes the assessment of the conduct. To put it differently, the opinion about character, already formed, leads to the opinion about the witness's conduct in the particular trial, and not *vice versa*. The two illustrations, read together, indicate with a fair measure of clarity the requirement connoted by the word "as far as his character appears in that conduct and no further". Incidentally, this requirement is found not only in the fifth exception, but also in the second, third and sixth exceptions to the section.

The authors of the Indian Penal Code have tried to explain at length the rationale of the exception.[53] But there is hardly any case law on the fifth exception. Presumably, cases involving the merits of a decision of a court (falling under the first part of the fifth exception), would mostly involve issues belonging to the region of the law of contempt of court, rather than to the law of defamation As regards the other parts of the exception, in India, comments respecting the conduct of witnesses and parties do not appear frequently in

52. Point for consideration.
53 See Ratan Lal, *Law of Crime* (1971), citing draft Penal Code, note R.

newspapers or periodical writings, and this seems to account for the paucity of case law. Probably, the strictness of the law of contempt of court might have had a chilling effect on the publication of comments relating to cases decided in a court. In any case, the fifth exception does not need further discussion.

Sixth Exception

One can now proceed to the sixth exception to section 499. A mention has been made above that some segments of "fair comment" are covered by the second and third exceptions to section 499. A very wide segment is taken care of by the sixth exception, concerned with comments on the merits of a public performance. An opinion expressed in good faith respecting the merits of any performance which its author has submitted to the judgment of the public is exempt from criminal liability. A similar immunity is conferred on an opinion expressed in good faith respecting the character of the author so far as his character appears in such performance, and no further.

The crux of the immunity lies in the requirement of submission of the work to the judgment of the public. The explanation to the exception provides that a performance may be submitted to the judgment of the public expressly, or by acts on the part of the author which imply such submission to the judgment of the public. Thus, as is elucidated by illustrations (*a*), (*b*) and (*c*) to the exception, a person who publishes a book, makes a speech in public or appears as an actor or singer on a public stage submits his work to the judgment of the public.

Besides the requirement of submission of a performance to the judgment of the public (which is discussed in the preceding paragraph), the sixth exception postulates that the opinion must be expressed in good faith, and also that a comment respecting the character of the author of a work is protected only in so far as his character appears in such performance, and no further. This limitation is illustrated by illustrations (*d*) and (*e*) to the sixth exception. Thus, there is protection for a statement made in good faith in these terms: "Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind." But there is no protection for a statement in these terms: "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine." Here the opinion expressed about Z's character is not founded on Z's book. The distinction so illustrated is similar to that illustrated by the illustrations to the fifth exception.

Not much case law exists on this particular exception, but it is useful to refer to a Bombay case,[54] wherein it was emphasised that the responsibility of the critic of a public performance, where he seeks to rely on the defence of fair comment underlying this exception, is to be gauged by the effect which his

54. *Emperor* v. *Abdool Wadood Ahmed*, I.L.R, 31 Bom. 293 (1907).

comment is calculated to produce, and not by (what he says was) his intention. It was also pointed out that the object of the sixth exception is that the public should, in its evaluation of a performance submitted to public judgment, be aided by a comment on that performance. Hence, the comment must make it clear that the judgment of the public is sought to be aided only on such evidence as is supplied by the public performance.

The defence of fair comment under the sixth exception to section 499 is available as much to newspapers, as to others. At the same time, newspapers do not enjoy a higher protection than ordinary citizens — a protection well emphasised by the Privy Council[55] in a criminal appeal heard by it, from Calcutta where the following observations occur :

> Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever length the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher.[56]

Seventh Exception

To turn now to the seventh exception to section 499, it provides that it is not defamation of a person having over another any authority, either conferred by law or arising out of a lawful contract made with another, to pass in good faith, any censure on the conduct of that other in matters to which such lawful authority relates. The illustration to the exception gives six instances of censure protected by this exception, if good faith is established, as under : —

(i) a judge censuring the conduct of a witness or of an officer of the court ;

(ii) a head of department censuring those who are under him ;

(*iii*) a parent censuring his child in the presence of other children ;

(*iv*) a school master, whose authority is derived from a parent censuring a pupil in the presence of other pupils ;

(*v*) a master censuring a servant for remissness in service ;

(*vi*) a banker censuring the cashier of his bank for the conduct of the cashier as such cashier.

Case law under the seventh exception has involved a variety of situations such as, a village *Panchayat* making remarks that are *prima facie* defamatory;[57]

55. *Channing Arnold* v. *Kings Emperor*, *supra* note 8 (per Lord Shaw).
56. *Id.* at 124.
57. *Kamla* v. *Bhagwandas*, A.I.R. 1934 Nag. 123, 124.

a religious head of a sect issuing an interdict;[58] the general manager of an organisation placing before the board of directors a report made by his subordinate officer which was adverse to another officer.[59] The decisions, however, do not raise any issues requiring detailed discussion or comment.

Eighth Exception

A theme connected with the seventh exception to section 499 (censure passed by the person having lawful authority) is dealt with in the eighth exception which renders immune the person who, in good faith, prefers *an accusation against any person* to any of those who have lawful authority over that person, with respect to the subject matter of the accusation. As the illustration to the exception tells us, if A, in good faith, (*i*) accuses Z before a magistrate, or (*ii*) complains against Z, a servant, to Z's master, or (*iii*) complains of the conduct of Z, a child, to his (the child's) father, A is within the exception.

It should be noted that good faith and lawful authority are important ingredients of this exception. From the reported decisions on the subject, it appears that, in practice, this often turns out to be a crucial issue when the question to be determined is whether, in the particular case, the exception does or does not apply. Thus, a complaint made to a police constable is not protected, if good faith is not affirmatively proved, or if the police constable has no authority in the matter. In a Nagpur case,[60] a woman made a false report to the police that her modesty had been outraged by the servants of A (a *malguzar*) at the instigation of A. The report was held to be defamatory, as lowering the complainant in the estimation of right-thinking persons. Although her offence fell under section 211 of the Indian Penal Code (making a false charge), A was not precluded from proceeding under section 500 of the code

In an Allahabad case,[61] a woman made certain defamatory and false statements against a government official and on inquiry, she repeated the same before the inquiry officer which amounted to be a publication of the original petition. It was held that the case was not covered either by the second exception (because it was not a mere expression of opinion), or by the eighth exception (as there was no good faith). The woman was, therefore, held guilty of three separate publications of libel.

It is also important to bear in mind the requirement of "lawful authority" occurring in the eighth exception. Thus, a complaint made to the district *panchayat* officer that the complainant's neighbour was keeping a bawdy house

58. *Sukratendra Tirtha Swamiar* v. *Prabhu*, A.I.R. 1923 Mad. 587, 591.
59. *Brij Ballabh* v. *Shri Satya Dev*, A.I.R. 1960 Raj. 213, 214.
60. *Mt. Binta* v. *Emperor*, A.I.R. 1936 Nag. 240, 242.
61. *Jai Debi* v. *Emperor*, A.I.R. 1915 All. 162, 163.

is not privileged, since the *panchayat* officer had no lawful authority in the matter.[62]

In reported decisions on the eighth exception, one occasionally comes across observations of "absolute privilege".[63] However, as was pointed out in a Gujarat case,[64] the eighth exception does not formulate any rule of absolute privilege. Thus, a statement made to a higher authority by way of complaint, and casting an imputation on the character of a co-villager, is privileged only if the imputation is made in good faith, *i.e.* with due care and attention.[65] The status of the privilege enjoyed in criminal law by witnesses who give evidence in judicial proceedings is that of qualified privilege. The term "absolute privilege", which is used in connection with civil liability for such statements or evidence,[66] is not quite appropriate for criminal liability under section 499. As was pointed out in a Madras case,[67] in civil courts, witnesses cannot be sued for damages for defamation in respect of evidence given by them in judicial proceedings, but in a criminal prosecution the question of absolute privilege does not arise in view of section 499 of the Indian Penal Code.[68]

So far as newspapers are concerned, the eighth exception to section 499 cannot generally be of much importance, because an accusation before the publication in a newspaper is not the sort of accusation before "lawful authority" contemplated by the exception.[69]

Eighth and Ninth Exceptions—Inter-relationship

Interesting questions could arise about the inter-relationship of the eighth exception with the ninth exception. The point of difference between the two is that while the eighth exception requires that the complaint must have been made to a person who has lawful authority to deal with the subject and to take proceedings against the person complained against, the ninth exception contains no such requirement. For the purpose of the ninth exception, it is sufficient that the communication is made to a person, *inter alia*, for protecting the interest of the person who is making it in which the recipient of the statement may also be interested.[70]

Defamation and other Related Offences

There may also arise interesting questions as to the inter-relationship of

62. *Kanwal Lal* v. *State of Punjab*, A.I.R. 1963 S.C. 1317, 1318, 1319.
63. *Golap* v. *Bholanath*, I.L.R. 38 Cal. 880, 888 (1911).
64. *Gulabchandra Soni* v. *The State of Gujarat*, A.I.R. 1970 Guj. 171, 173.
65. *P. Kamayya* v. *K. Tripurantakam*, 15 Cri. L.J. 281.
66. *Lala Lachman Prasad* v. *Majju*, A.I.R. 1923 All. 167 (Walsh, J.).
67. *Narayana* v. *Veerappa*, A.I.R. 1951, Mad. 34, 38, 40, para 8-10.
68. For earlier cases, see *Satish Chandra* v. *Ram Doyal*, A.I.R. 1921 Cal. 1 (F.B.).
69. *Chandrasekhara* v. *Karthikeyan*, *supra* note 24 at 284;
70. *Kanwal Lal* v. *The State*, *supra* note 62.

defamation with *other wrongs and offences.* Libellous reflection upon the conduct of a judge in respect of his judicial duties may certainly come under section 499, and it may be open to the judge to take steps against the libeller in the ordinary way for vindication of his character and personal dignity as judge; but such libel may or may not amount to contempt of court, which is something more than mere defamation and is of a different character. What is made punishable in the Indian Penal Code is the offence of defamation *as defamation* and not as contempt of court. If defamation of a subordinate court amounts to contempt of court, proceedings can certainly be taken under the Contempt of Courts Act, quite apart from the fact that another remedy may be open to the aggrieved officer under section 499.[71]

Questions have also arisen as to the distinction between the eighth exception to section 499 and the proviso to section 132 of the Evidence Act. It has been held that the proviso to section 132 of the Evidence Act, assumes that the accusation contained in the answer is punishable as defamation. But notwithstanding that position, the proviso excludes a prosecution for defamation, and bars proof of the accusation in a trial for defamation. The proviso to section 132 of the Evidence Act applies even if the statement, not being made in good faith, is not covered by the eighth exception to section 499.[72]

Ninth Exception

The ninth exception to section 499 confers immunity from criminal liability where the imputation is made on the character of another person—

(*a*) for the protection of the interests of the person making the imputation, or

(*b*) for the protection of the interest of any other person, or

(*c*) for the public good.

Two illustrations below this exception relate to—

(*i*) a shopkeeper warning his manager about Z, as to whose honesty the shopkeeper has no opinion, and

(*ii*) a magistrate making a report to his own superior officer, casting an imputation on the character of Z.

These imputations are immune from liability if made in good faith for the protection of his own interest (by the shopkeeper) or for the public good (by the magistrate). Strictly speaking, the illustrations do not afford much help, since they "illustrate" nothing.

71. *Ramakrishna Reddy* v. *The State of Madras*, A.I.R. 1952 S.C. 149, 152.
72. *Chotkan* v. *The State*, A.I.R. 1960 All. 606, 608, para 4.

Ingredients of the Ninth Exception

Briefly, there are two ingredients essential for applying the ninth exception, namely,—

(*i*) the statement must be made for protecting the interest of the maker or recipient of the communication or for the public good, and

(*ii*) the communication must be made in good faith.

Unlike the first exception, the ninth exception does not require that the imputation must be true.

As regards the first ingredient the court has to decide what interest the person accused of defamation was trying to protect. The interest sought to be protected can be a private one, or it may be the public good. But the *mere belief* of a person that he is seeking to protect such an interest or the public good is not enough.[73] The existence of a legitimate interest of the maker or recipient or of the public good must be established objectively.[74]

Incidentally, the reason why public good is a legitimate occasion for privilege in regard to defamation is that the right of a person to have his reputation maintained has sometimes to give way to the public good, but the injury caused to a person must be compensated for by the resultant advantage to the public.

Good faith under the Ninth Exception

The concept of good faith, which is the second essential ingredient of the ninth exception, requires honesty of purpose, as also due care and attention. Honesty of purpose as an ingredient of good faith has been elaborated in a Madras case,[75] which emphasises that the accused must honestly believe the imputation to be true and must make the imputation honestly from a sense of duty to himself.

The care and attention required must have relation to the occasion and the circumstance.[76] At the same time, it is not necessary to prove that every word spoken or written is literally true. If the allegations made are such that, having regard to certain facts and circumstances within his knowledge, the accused might, as an ordinarily reasonable and prudent man, have drawn the conclusion which he expressed in defamatory language for the protection of his own interest, he can be said to have acted in good faith.[77]

---

73. *Bholanath* v. *Emperor*, *supra* note 19.
74. *Chaman Lal* v. *State of Punjab*, A.I.R. 1970 S.C. 1372, 1375.
75. *Ayeasha Bi* v. *Peerkhan*, A.I.R. 1954 Mad. 741, 748, 749, paras 15-18.
76. *Anandrao* v. *Emperor*, A.I.R. 1915 Bom. 28, 35.
77. *Abdul Hakim* v. *Tej Chandar Mukarji*, I.L.R. 3 All. 815, 818 (1881) (petition before court—statements in).

Broadly speaking, it can be said that in so far as good faith requires due care and attention, the test is an objective one. The emphasis is on enquiry, care and objective satisfaction, as pointed out by the Supreme Court.[78] The same view has been taken by the several High Courts.[79] There cannot be good faith if there is recklessness. A mere plea that the accused believed in the truth of the allegation is not enough.[80]

Of course, this does not mean that the accused can make the allegations first and gather later the evidence supporting his allegation. The evidence supportive of the allegation must be in the possession of the accused when he made the statement, if he desires to establish good faith. Evidence which was gathered subsequently, but which was not at the disposal of the accused when he made the defamatory imputation, cannot be allowed to prove his good faith.[81] In this sense, the test is not an exclusively objective one.

It appears that the following points have to be considered in order to establish good faith :

(a) circumstances under which the imputation was made or published;

(b) whether there was any malice;

(c) whether the accused made any inquiry before he made the allegations;[82]

(d) whether there are reasons to accept the version that the accused acted with care and caution; and

(e) whether there is preponderance of probability that the accused acted in good faith.

Burden and Quantum of Proof

It is also settled that the onus lies on the accused to establish the plea taken by him that the case falls within the ninth exception of section 499.[83] This is the general rule applicable in regard to all the exceptions[84] under section 499 and, indeed, to all special or general exceptions contained in the Indian Penal Code.[85]

78. *Sukra Mahto* v. *Basudeo Kumar*, A.I.R. 1971 S.C. 1567, 1969.
79. See *Ram Kumar* v. *State*, (1962) 1 Cri. L.J. 122, 124, 125 (All.) (statements published without basis). *Anandrao* v. *Emperor*, *supra* note 76; *Balasubrahmania* v. *Rajagopalachariar*, A.I.R. 1944 Mad. 484, 492, 494; *Amar Singh* v. *K.S. Badalia*, (1955) 2 Cri. L.J. 693, 699 (Patna).
80. *Dr. L.C. Randhir* v. *Girdharilal*, (1978) Cri. L.J. 879.
81. *Superintendent & Remembrancer of Legal Affairs* v. *P.C. Ghosh*, *supra* note 49.
82. *Chaman Lal* v. *State of Punjab*, *supra* note 74 at 1374.
83. *Ibid.*
84. *Harbhajan Singh* v. *State of Punjab*, A.I.R. 1966 S.C. 97, 102.
85. *Surajmal* v. *Ramnath*, A.I.R. 1928 Nag. 58, 62; (dissenting from *Umed Singh*, *supra* note 6); *C.C. Das* v. *Raghunath Singh*, A.I.R. 1959 Orissa 141, 143.

The contrary view taken in an Allahabad case,[86] relating to the first exception to section 499 does not appear to be correct and has been expressly dissented from in a Nagpur case.[87]

However, the burden is not so onerous as that of the prosecution in proving guilt.[88]

Position of Newspapers under the Ninth Exception

The ninth exception to section 499, in so far as it protects an imputation published in good faith for the public good, is of special relevance to newspapers. Case law involving newspapers under this exception is profuse; some points of peculiar interest can be usefully illustrated.

At the outset, let it be stated that even where the occasion is privileged, excess of publication (*e.g.* publication in a newspaper where the occasion justified only a less wide mode of publicity) may defeat the privilege. Thus, there is a Travancore-Cochin case[89] which holds that a libel containing a charge of bribery against a magistrate is not protected if published in a newspaper. It was held that the public good could have been protected by making a representation to the government. Publication in a newspaper was held to be excessive in the circumstances and destroyed the privilege.

Similarly, in a Madras case,[90] publication of a notice in the newspaper having wide circulation was held to be outside the ninth exception. In that case, the notice stated that the accused feared that the complainant and other persons would cause bodily harm to the accused, and if anything befell the accused, the complainant and his men would be responsible. The High Court held that there was no justification for publishing the notice in a newspaper. There are also a few earlier cases[91] relating to excessive publication.

Position of Newspapers vis-a-vis the Law of Defamation

Assuming that, in the circumstances of the case, the publication of libellous matter claimed to be privileged is not to be regarded as "excessive", it must still be remembered that in the matter of defamation, the position of newspapers is not, in any manner, different from that of members of the public in general. This proposition has been emphasised more than once in the case law.[92] It is, therefore, surprising that attempts are still made from time to time

86. *Umed Singh* v. *Emperor*, *supra* note 6 at 300.
87. *Surajmal* v. *Ramnath*, *supra* note 85.
88. *C.C. Das* v. *Raghunath Singh*, *supra* note 85 at 143, para 7.
89. *State* v. *Packiaraj*, *supra* note 47.
90. *Mammunhi* v. *Abdul Rahiman*, 50 Cri. L.J. 710 (1949).
91. *Thiagaraya* v. *Krishnasami*, I.L.R. 15 Mad. 214 (1892); *Vinayak* v. *Shantaram*, A.I.R. 1941 Bom. 410.
92. *Thakur Dongar Singh* v. *Krishna Kant*, A.I.R. 1958 M.P. 216, 217, 218; *Debajyoti Burman* v. *The State*, *supra* note 4; *Abid Ali Khan* v. *Prabhakara Rao*, (1968) Cri. L.J. 398, 402, para 17 (Andhra Pradesh).

to persuade the courts to adopt a contrary approach. These attempts never succeed.

In fact, there are observations in a Calcutta case that the editor of a local journal must submit to a more rigorous test of good faith, when he claims the protection given by the exception.[93]

It has been emphasised in an Allahabad case that the editor of a newspaper should be most watchful not to publish defamatory attacks upon individuals, unless he first takes reasonable pains to ascertain that there are strong and cogent grounds for believing the information which is sent to him, to be true,[94] that proof is readily available and that in the particular circumstances his duty to the public requires him to make the facts known. This judicial anxiety is understandable, when one bears in mind that (*i*) a libel published in a newspaper has a much wider circulation than other libels; and (*ii*) that the ordinary reading public is more prone to believe the printed word, than a hand-written libel—particularly when the printed word is published in a newspaper.

In deciding whether an accused person acted in good faith under the ninth exception, it is not possible to lay down any rigid rule or test. The court will have to find out the circumstances in which the imputations were made; whether they were fraught with malice; whether the accused had made any enquiry; whether it was with due care and attention or whether it was reckless so that it could be said that it was in good faith or bad faith. If there is preponderance of probability that the accused acted in good faith, the element of good faith could be taken as proved.[95]

In the context of good faith, it is proper to point out that absence of malice and presence of good faith are not synonymous. A person who has not taken reasonable care does not act in good faith.[96] Thus, the fact that the publisher of a defamatory imputation, on learning of the true facts, published a correction the very next day may prove his absence of malice, but does not establish due care and attention which is an essential ingredient of good faith.

Attitude towards Newspapers

This does not, however, mean that courts have adopted any rigid attitude towards newspapers while administering the law relating to good faith. Rather, the majority of the reported decisions show that a sincere attempt is made to hold a balance between the protection of reputation and the need to bring before the public matters which concern the public. In fact,[97] the law reports provide us with an interesting instance—not very old—in which the

93. *Bibhuti Bushan* v. *Sudhir Kumar*, A.I.R. 1966 Cal. 47.
94. *Mohammad Nazir* v. *Emperor*, *supra* note 30 at 324.
95. *Dr. L.C. Randhir* v. *Girdharilal*, *supra* note 80.
96. *Bibhuti Bhushan* v. *Sudhir Kumar*, *supra* note 93.
97. *Balasubramania* v. *Rajagopalachariar*, *supra* note 79.

courts seem to have gone to the utmost length in holding that the publication of a certain matter, even though the factual assumptions were incorrect, deserved protection on the ground of good faith (and public good). This was a criminal prosecution for defamation, the person alleged to have been defamed was none other than the eminent Indian statesman Shri C. Rajagopalachariar. After he had resigned as the Chief Minister of the Madras Province under the Congress government, the Justice party in its weekly newspaper *Sunday Observer* published a news item containing certain allegations, the gist of which was that Gandhiji and Rajagopalachariar, "in league" with each other, were encouraging violence. While laying down the propositions that (*i*) the editor of a newspaper is in no better position than an ordinary citizen, and (*ii*) where protection is claimed under an exception (ninth exception) which requires good faith, recklessness may negative good faith, the High Court held that the ninth exception may protect even baseless or incorrect statements if there is good faith. On the facts, the printer and the editor (who were the accused) were held to have acted in good faith.

The element of "public good" is also crucial for newspapers. Thus, a Madhya Pradesh case[98] relating to a libel in a newspaper holds that there can be no "public good" in telling the world that a person was killed, when, in fact, he died a natural death. Similarly, there cannot be "public good" in telling the public that a death was caused by a particular person, when that person was not, in any way, concerned with it.

Tenth Exception

This disposes of the ninth exception to section 499. A limited and specialised area of protection is the subject matter of the tenth exception to the section. It gives immunity to caution conveyed in good faith to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Most of the reported decisions on the tenth exception relate to caste matters, and things done at caste meetings. They do not decide any points of general importance or juristic interest.[99]

An interesting question arose in a Punjab case[100] concerned with tortious liability, not for defamation but for giving wrong information leading to the publication of a defamatory imputation which, in turn, resulted in conviction. The case is a civil one, but was the offshoot of a conviction for defamation. Can the editor of a newspaper, convicted of defamation, sue in damages the

98. *Thakur Dongar Singh* v. *Krishna Kant*, *supra* note 92.

99. *Haripado* v. *Emperor*, A.I.R. 1930 Cal. 645, 646 (allegation that complainant married a woman already married). *Thiagaraya* v. *Krishnasami*, *supra* note 91; *Paduram* v. *Biswambar*, A.I.R. 1958 Orissa 259.

100. *Gurbachan Singh* v. *Babu Ram*, A.I.R. 1969 Punj. 201, 203, para 6.

person who gave wrong information which led to the publication of a defamatory statement by the editor ? This was the novel point which the High Court of Punjab had to decide. The case arose out of the conviction for defamation of the editor of the Urdu weekly "*Sach*" published from Ludhiana. It was held that the law recognises no such right of action. The editor must himself check the veracity of information received by the newspaper. If the editor publishing a defamatory report is convicted, he cannot sue the supplier of the wrong information.

Of course, the manner in which the issue was presented in the Punjab case did not allow of a consideration of the interesting, though vexed, question of contribution between concurrent or connected tort feasors.[101]

101. The point, though not raised, may be of interest for purposes of civil liability.

CHAPTER 17

Punishment

THE PUNISHMENT for the offence of defamation under section 500 of the Indian Penal Code is *simple* imprisonment upto two years or with fine or with both. With reference to this section, the Law Commission of India, in its *Report on the Indian Penal Code*,[1] recommended that the punishment should be imprisonment of *either description* upto two years and further recommended that where the defamatory statement has been published in a newspaper and thus made known to a large number of persons, the fact of the offender's conviction should be similarly published. The cost of publication should be recoverable from the convicted person as a fine. Accordingly, the Law Commission recommended that section 500 should be revised as under :

500. Punishment for defamation—

(1) Whoever defames another shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

(2) Where the offence has been committed by publishing an imputation in a newspaper, the Court convicting the offender may further order that its judgment shall be published, in whole or in part, in such newspaper as it may specify.

(3) The cost of such publication shall be recoverable from the convicted person as a fine.

The Second Press Commission also in its report[2] expressed its agreement with this recommendation of the Law Commission.

The recommendation of the Law Commission deserves to be implemented.

---

1. Law Commission of India, *42nd Report* 331, para 21.5 (1971).
2. *Report of the Secoud Pres s Commission*, vol. 1, pp. 44-45, para 73, (1982).

CHAPTER 18

Some developments in Australia and the United Kingdom

Uniform Defamation Law in Australia

LEGISLATION RELATING to defamation in Australia is the responsibility of the states. But there have been attempts in recent years to implement uniform legislation throughout the country. It is understood that Senator Evans, the Attorney-General in the new Australian government, has made a recent announcement indicating that good progress is being made among the states in agreeing to this new legislation.[1] Further developments will be awaited with interest.

It would appear that in Australia, the draft model Uniform Defamation Bill has not yet been released to the public. The Report of the Australian Law Reform Commission entitled *Unfair Publication : Defamation and Privacy* contains, in Appendix C, a draft model Unfair Publication Bill. The proposed model uniform Bill for defamation in Australia, it is understood, is based on the draft appended to the above report, though it has significant differences in form.[2]

At present, the states in Australia have their own laws on the subject. Thus, in New South Wales, the relevant law is the Defamation Act, 1974. In Western Australia, there is no Defamation Act and the relevant statutory provisions codifying the common law are contained in the Newspaper Libel and Registration Act, 1884 and amendments of 1888 and 1957, the Parliamentary Privileges Act, 1891, the Parliamentary Papers Act, 1891, the Slander of Women Act, 1900 and the Criminal Code, 1913 and amendments.

It would be proper to await concrete legislative action to be taken in Australia.

Developments in the United Kingdom

Certain statutory reforms affecting the law of torts in the sphere of defamation were achieved in the United Kingdom by the Defamation Act, 1952. Thereafter, there was the report of the Committee on Defamation, forwarded

1. Letter No. 122/14 dated 11th August, 1983 from the First Secretary (Information), Australian High Commission to P.M. Bakshi.
2. Letter dated 30th August, 1983 addressed to P.M. Bakshi by R.M. Armstrong, Secretary to the Standing Committee of Attorneys-General, Parliamentary Counsel's Chambers, 221 Queen Street, Melbourne, VIC. 3000.

in 1975.[3] The report has not yet been implemented, but its important recommendations may be summarised as under :

(a) Defamation should be defined, by statute, as under :

> Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally.

(b) The distinction between libel and slander should cease to be a part of the English law.

(c) Where a civil action for defamation is concluded, it should no longer be permissible for the plaintiff, to bring or continue other proceedings (for defamation) for the same or any other publication of the same matter.

(d) No change is to be made in the special defence of "innocent dissemination" as available to the distributors of defamatory matter, so as to give greater protection to distributors.

(e) Punitive damages for defamation should be abolished (a few other points concerning damages were also made).

(f) Where there is defamation of a deceased person, the relatives of the deceased person should be allowed to sue for a declaration and injunction within five years of the death.

(g) The criminal law of libel should continue.

(h) A proceeding for defamation should be tried ordinarily by a judge; the jury should be permissible only in exceptional cases.

(i) Legal aid should be available in actions for defamation.

The recommendations of the Committee on Defamation were noted by the Royal Commission on the Press in Britain, known as the McGregor Commission.[4] The Royal Commission did not consider it proper to make any recommendations of its own on the subject, except in regard to two matters (to be mentioned presently). The Royal Commission noted that the inquiry by the earlier committee on defamation, as well as by the earlier committees on privacy, contempt of court and official secrecy, had been exhaustive. Moreover, the Royal Commission did not consider itself well equipped to conduct an inquiry of its own. However, on certain matters, the Royal Commission did express its views. So far as as concerns the law of defamation, it made the following recommendations of importance :

(a) In regard to the defence of innocent dissemination as available to the distributors of defamatory matter, it recommended that distributors of books or

3. Faulks Committee, *Report on the Law of Defamation* (March, 1975).
4. *Report of the Royal Commission on the Press* Cmd. 6810, pp. 191-193, paras 19.35 to 19.36 (July 1977).

papers should not be liable for defamation, even if they knew that the book or paper was of a character likely to contain a libel, provided—

(i) they did not know that the book or paper contained a libel, and

(ii) such want of knowledge was not due to any negligence on their part.

The recommendation for expansion of the scope of innocent dissemination is in substantial agreement with the view taken by Lord Denning in a case decided in 1977 by the Court of Appeal.[5]

(b) The Royal Commission further recommended that all prosecutions for criminal libel should be conducted by the Director of Public Prosecutions, and private prosecutions for libel should no longer be permitted.

5. *Goldsmith* v. *Sperrings Ltd.*, (1977) 1 W.L.R. 478. (C.A.).

CHAPTER 19

Newspapers and the Criminal Law of Defamation

1. The General Approach

IT IS proposed now to deal with some points of special interest to the press in the context of the liability of editors, printers and publishers of newspapers and journals for defamation as an offence. The general position, of course, is well-accepted, that a newspaper stands in no higher position than an individual in regard to the law of defamation.[1] In fact, many of the important points laid down in the case law wherein editors or publishers of newspapers happened to figure as the accused parties are relevant for citizens generally, and *vice versa*. Still, there is scope for, and utility in, focussing attention on a few points of special interest to newspapers.

Special Responsibility of Editor

Recognising that the press wields a tremendous power over the public mind, courts have sought to emphasise the heavy responsibility of the editor for publishing offending matter. Thus, it has been held[2] that an editor should be most watchful not to publish defamatory attacks upon individuals, unless he first takes reasonable pains to ascertain that there are strong and cogent grounds for believing the information which is sent to him to be true.

The Allahabad High Court[3] has held that the accused must prove that he used "due care and attention". It is certainly not using due care and attention to publish defamatory statements about a person and also to publish his denial and let the public take their choice. The judgment stresses the duty of an editor not to publish clearly defamatory matter without taking steps to have an inquiry made and without sufficient evidence.

Newspapers and Fair Comment

It is in this context that the courts have had occasion to point out that the editor who relies on the defence of fair comment must make proper inquiries as to the truth of the statements made to him. A plea of "fair comment"

1. See *supra* ch. 16.
2. *Mohammad Nazir* v. *Emperor*, A.I.R. 1928 All. 321, 324; *Balasubrahmania* v. *Rajagopalachariar*, A.I.R. 1944 Mad. 484.
3. *Emperor* v. *J.M. Chatterji*, A.I.R. 1933 All. 434, 435. (Papers *Garhwali* and *Indian States Reformer*).

cannot, therefore, be entertained, if there have been misrepresentations or mis-statements of facts which the editor could have discovered if he had made proper inquiries. A Sind case[4] of particular importance to newspapers deals elaborately with the distinction between (*i*) fair comment based on well-known or admitted facts; and (*ii*) the assertion (for the purpose of comment) of unsubstantiated facts. Where comment is made on allegations of facts which do not exist, the very foundation of the plea disappears. In this case, the editor of a Karachi newspaper, *The Alwahid* was convicted of defamation. The libel was against one Abdul Kadir and the allegation was that he had told the shipping companies not to sell tickets to one *Moulvi*. The allegations were found to be totally false. In the circumstances, the ninth exception to section 499 was held not to apply.

This does not, however, mean that the public duty performed by the press has gone totally unnoticed by the court. The courts have often tried to give the benefit of doubt to newspapers. A Madras case[5] which holds that where a newspaper article is capable of two interpretations, one of which would make it defamatory while the other would render it innocent, the article should be interpreted in favour of the accused, and the more sinister interpretation should not be placed upon it.[6]

Good faith of the Editor with reference to the Third Exception

A similar liberal approach is to be found in a Punjab case,[7] relating to an article published in a newspaper pertaining to the conduct of a public servant. It was held that if the evidence reveals that the editor had material to support the allegations made against the public servant, and published it after due care and attention, and expressed his opinion on the conduct of the public servant on a question of public importance, the case falls within the third exception to section 499 of the Indian Penal Code and there was no criminal liability, in the circumstances.

Position of the Press

The privilege of the press is not an absolute one, but is qualified, and is circumscribed within the limits of the provisions enjoined in the statutes. It was so held in a Calcutta case.[8] It also holds that a newspaper publishing a report alleged to be defamatory cannot be brought within section 499 unless

4. *Mir Allahbukkhan* v. *Emperor*, A.I.R. 1929 Sind 90, 91 (reviews English cases).
5. *C. Karunakara Menon* v. *T.M. Nair*, A.I.R. 1914 Mad. 141 (1). (Editor of the *Indian Patriot*, Madras).
6. See *infra* p. 105.
7. *Girdhari Lal* v. *State*, (1969) Cri. L.J. 1318, 1322. (Editor of Urdu weekly *Naya Bharat*, published from Pathankot).
8. *N.J. Nanporia* v. *Brojendra Bhowmick*, 79 C.W.N. 531, 535 (1974-75) (N.C. Talukdar and A.K. De, JJ.).

there is proof of express malice. In that case, a newspaper, in the usual course of reporting, reported under a headline "alleged wagon-breaker shot dead", that one person "alleged to be a wagon breaker and wanted in connection with a number of police cases" was shot at by the police when he and his associates were "alleged to have attacked the police with daggers and swords" and had died. It was held that the publication was guarded enough, mentioning clearly and referring to the sources "as alleged to be" and was published without express malice and, therefore, did not come within the bounds of section 499 of the Indian Penal Code.

With respect, it is difficult to accept the position that every case in which there is absence of express malice is protected. It is submitted that a case must be brought within one or the other of the exceptions to section 499.

II. The Various Persons Engaged in the Production of Newspapers

Liability of Various Persons

At this stage, it may be useful to consider one aspect which is of peculiar importance to the press. In an ordinary libel, the author is generally the single person liable and there does not arise a need to consider the liability of several persons. Newspapers, however, involve the joint efforts of so many persons. In the production and distribution of a newspaper, a number of persons play their part—financial, technical, managerial, intellectual and ministerial. The question how far each of them is liable for actionable or punishable matter published in the newspaper must naturally arise from time to time. Anticipating such questions, the Indian Penal Code deals, in three sections (500, 501 and 502), with the liability of some of them. The Press Act[9] also contains a provision under which there is a presumption that a certain person is the printer or publisher of every portion of every copy of a newspaper conforming to the requirements envisaged by the Act, or (as the case may be) is the editor of 'every portion' of a newspaper carrying his name as editor. The statutory provision in the Press Act is, of course, an omnibus one, embracing all types of civil and criminal liability. The provision is not confined to defamation or any other specific crime or tort. Besides this, the case law shows that attempts are sometimes made to launch criminal prosecutions against certain other persons who are directly or indirectly concerned with the production of newspapers. It seems useful to refer to some of the important legal propositions that emerge out of the provisions of the Indian Penal Code as supplemented by the case law.

The points so emerging relate mostly to the editors and printers. However, before dealing with them, the position on the subject of the liability of a few other persons may be disposed of. Take, first, the director of a company.

9. S. 7, Press and Registration of Books Act, 1867. See *infra* p. 106.

In a Calcutta case,[10] the question arose whether *the director of a company* owning a press in which a Bengali weekly containing defamatory matter was printed was criminally responsible. The High Court held that such a person is neither the maker nor the publisher of the imputation and is not, therefore, liable to prosecution for the defamatory matter so published.

In another case—also from Calcutta[11]—the question arose as to the liability of the owner of a journal which had carried matter alleged to be defamatory. The owner had appointed an editor of the journal and the question fell to be considered as to who was liable for defamatory matter. The propositions laid down by the High Court may be thus stated :

(*a*) The owner of a journal, by appointing an editor for editing it, vests him with the responsibility for running the paper, and also for carrying out his policy in that matter. If, in carrying out that responsibility, the editor does anything illegal, that illegality should not be attributed to the owner merely by virtue of his being the owner of the journal.

(*b*) But liability of the owner of the journal will be attracted, if it can be shown that he was responsible for publication with necessary intent, knowledge or reasonable belief in the matter.

III. The Editor's Liability

Such cases involving the directors or owners of press establishments may be comparatively rare. But the editors of newspapers often figure as accused persons in prosecutions for defamation. It may be mentioned that section 500 of the Indian Penal Code punishes a person who "defames" another. By section 499 of the code, a person who "makes or publishes" a defamatory imputation is said to defame another. An editor has been held to fall under section 500.[12] Thus, where an editor wrote an article that incited communal feelings and made Hindus and Muslims lose faith in the complainant, the editor was held criminally liable for defamation.[13] The libel in this case was found to be gross and scandalous, published maliciously with intent to injure the complainant's reputation. In another case, an editor was held guilty for publishing against the Governor of Orissa an imputation which was untrue and published without verification.[14]

10. *Sunilakhya* v. *H.M. Jadwet*, A.I.R. 1968 Cal. 266, 271, para 11;
11. *Bhagat Singh Akali* v. *Lachman Singh Akali*, A.I.R. 1969 Cal. 296, 298; (1968) Cri. L.J 759, 760, para 6, 7 (following *State of Maharashtra* v. *R.B. Chowdhury*, A.I.R. 1968 S.C. 110).
12. *Gour Chandra* v. *Public Prosecutor*, A.I.R. 1962 Orissa; 197, 202; (Oriya newspaper *Matribhumi* from Cuttack.
13. *Aziz Ahmad* v. *Emperor*, A.I.R. 1928 Lah. 865, 867, (Urdu newspaper *Muballigh*, from Delhi.)
14. *Gour Chandra* v. *Public Prosecutor*, *supra* note 12.

There have also been instances where the editor of a *newspaper himself wrote* the defamatory article. Obviously, in such cases, the editor would be liable personally, not only as one who "published" the offending matter, but also as one who "made" the offending imputation.[15]

Cases where the person whose name appears as editor is temporarily out of station or otherwise absent, may create problems.[16] According to the High Court of Travancore Cochin where the editor on leave entrusts the duties to a responsible person he (the person entrusting) is not criminally liable. These questions, however, also involve scope and interpretation of the Press Act,[17] and belong properly to a study of the provisions of that Act which, incidentally, is not confined to defamatory statements.

Re-publication

It should be noted that he who re-publishes matters heard from others is equally liable. Thus, if a current "rumour" heard from others is published in a newspaper, the editor is responsible, as if he had originally printed it. It is no defence that he heard the rumour from others and believed it to be true.[18] Evidence of the accused's being convinced as to the veracity of rumours is not sufficient to stave off the injurious consequences of an assault on reputation committed by the accused.[19]

IV. The Printer's Liability

So much as regards the liability of editors of newspapers. The liability of the printer of defamatory matter depends primarily on section 501 of the Indian Penal Code, which says "whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment "for a term which, may extend to two years or with fine or with both."

It may be pointed out that section 501 expressly requires the *mens rea* mentioned in the section (*i.e.* the requisite knowledge of, or reason for, believing certain facts). There is an interesting Kerala case[20] illustrating the importance of this requirement pertaining to the requisite mental element. It holds that if the printed matter is plainly defamatory, it is a "good reason" for the printer to know that it is defamatory. But the accused in this case was unable to read Malayalam (the language in which the alleged defamatory matter was printed). It could not, therefore, be said that the accused under-

15. *U. PO. Hnyin* v. *U. Tun Than*, A.I.R. 1940 Rang. 21, 22. (Newspaper *The Sun*, Rangoon)
16. *State* v. *Packiaraj*, A.I.R. 1951 Tra-Coch. 105: 52 Cri. L.J. 623.
17. S. 7, Press and Registration of Books Act, 1867.
18. *Mohammad Nazir* v. *Emperor*, *supra* note 2.
19. *Harbhajan Singh* v. *State of Punjab*, A.I.R. 1961 Punj. 215, 225, 226.
20. *Sankaran* v. *Ramakrishna*, A.I.R. 1960 Ker. 141:

stood the nature of the matter printed.

Where the printer is also the publisher, his liability would arise not only under section 501 of the Indian Penal Code (printer), but also under section 500 (publisher),[21] of the Code.

In regard to the printer and publisher, the statutory presumption in the Press Act[22] would render him *prima facie* liable even though he had entrusted the selection of news items to the editor.[23]

Plea of Want of Knowledge

A Punjab case decides an important point concerning the personal liability of the accused, who was the printer and publisher of an Urdu daily. He took the defence that the item in question had been published without his knowledge, because he had entrusted the selection of the news to the editor. Rejecting this contention, the High Court held that since the accused had filed the declaration under section 5 of the Press and Registration of News Act, 1867 (25 of 1867), *prima facie* he was responsible. The following observations in the judgment are of importance in this context :

> Section 7 of that Act, *inter alia*, provides that the production in any legal proceeding of an attested copy of such declaration shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be subscribed to such declaration that the said person was the printer or publisher of every portion of the newspaper in question. As the accused was the printer and publisher of the Hind Samachar at the relevant time and had filed the declaration to that effect, it shall be presumed that the accused was aware of what was printed and published in the issue of the Hind Samachar.
>
> The declaration is prima facie evidence of the publication by the accused of all the news items in the Hind Samachar and I have not been referred, at the hearing of the appeal, to any cogent material to show that the presumption about the accused being the publisher of the news item in question has been rebutted. The mere fact that, according to the accused, in daily routine he had asked the Editor to select the news item, would not absolve the accused for the publication of the news item in question.[24]

V. The Seller of Defamatory Matter

The sale of defamatory matter is dealt with in section 502 of the Indian Penal Code, which reads as under :

---

21 *Ramesh Chander* v. *The State*, A.I.R. 1966 Punj. 93, 95.
22 S 7, Press and Registration of Books Act, 1867.
23 *Ramesh Chander* v. *The State*, *supra* note 21.
24. *Id.* at 96.

> Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine or with both.

It has been held by the Chief Court of Punjab[25] that for a conviction under section 502, while it must be proved that the seller knew the substance sold to contain defamatory matter, it is not necessary also to prove that he knew the matter to be defamatory. The court, in this context, contrasted the more specific wording of section 501, which punishes the printer, and requires that he (the printer) should know, or, have good reason to believe, that the matter printed is defamatory of any person.[26]

It is, no doubt, necessary, in order to substantiate a charge under section 502, to prove that the seller of a printed substance knew its contents, (which imparts proof that he understood the language used) and also to prove that its contents are defamatory; but if the contents are defamatory there is no need to prove further that he knew them to be defamatory. A person who conducts business in the course of which he is liable to sell books or papers or the like, which may contain matter which is injurious to the reputation of another person, and may be, in fact, defamatory as defined in the Indian Penal Code, is bound, by reason of the penalty imposed by this section, if not otherwise, to abstain from selling any book or the like which to his knowledge contains matter which is defamatory. If he sells in ignorance of the contents, he is not guilty of an offence under this section. If he sells, *notwithstanding knowledge of the contents and if the contents are defamatory*, he is guilty.[27]

VI. Quantum of Punishment

In general, courts, while determining the question of quantum of punishment for the offence of defamation by newspapers, have taken a balanced view of the matter. While awarding punishment, attention has been properly paid to all the relevant factors that may aggravate or mitigate the guilt. Amongst the *principal aggravating factors* that have figured in the case law relating to defamation by newspapers may be mentioned the failure to express regret, though called upon to do so by the complainant.[28]

More numerous illustrations of the *mitigating factors* that are taken into account in sentencing for defamation are to be found in the case law. Amongst the principal mitigating factors that have been taken into account while awarding punishment, are the following :

---

25. *Sardar Dayal Singh* v. *Queen Empress*, (1891) Punj. Rec. (Cri.) No. 8, p. 19.
26. See *supra* p. 105 as to the printers liability.
27. *Supra* note 25 at 26.
28. *Muhammad Nazir* v. *Emperor*, *supra* note 2 at 326.

(*a*) The fact that the editor of the newspaper is a mere tool in the hands of its proprietor;[29]

(*b*) the fact that the accused had not been shown to be a habitual blackmailer and had tendered a written apology, though a qualified one;[30]

(*c*) the fact that the paper had a poor circulation and was a weekly one;[31]

(*d*) prompt publication of contradiction, coupled with absence of malice or ill-will, want of proof of wanton carelessness.[32]

Even in revision, the High Courts are generally reluctant to enhance the sentence awarded by the lower courts for defamation. A Punjab case[33] illustrates the general approach. The case involved a printer and the publisher of the *Hind Samachar*, an Urdu daily of Jullundur. In 1957, he had published matter which was highly defamatory of the then minister for forests in the state government, containing serious allegations of nepotism. Since the allegations were published without due care and inquiry, the ninth exception to section 499 was held to be inapplicable. It was pointed out that a bare assertion by the accused that he believed the allegation to be true could not exculpate him unless he showed that he had acted with due care and attention. The sessions judge had sentenced the accused to pay a fine of Rs. 300, or in default, to undergo simple imprisonment upto three months and the High Court found the sentence "not so manifestly inadequate as to justify enhancement in revision.[34]

VII. Jurisdiction and the Question of Publication

It is an accepted proposition[35] that publication is necessary to constitute a libel. The proposition is of as much importance in criminal law, as in the law of civil liability. Apart from its relevance to liability, the question of publication may be of relevance in regard to venue also. It is in this context that reference needs to be made to the Allahabad ruling,[36] concerned with criminal liability for a libel published in a newspaper. It holds that the delivery of a copy of a newspaper in a particular area is enough to constitute publication. It is not necessary that the copy should have been actually read by someone residing in that area.

29. *Aziz Ahmad* v. *Emperor*, A.I.R. 1928 Lah. 865, 867.
30. *T.G. Goswami* v. *The State*, A.I.R. 1952 Pepsu 165, 168.
31. *Ibid.*
32. *Thakur Dongar Singh* v. *Krishna Kant*, A.I.R. 1958 M.P. 216, 218. (Newspaper, *Nai Duniya*, from Indore).
33. *Ramesh Chander* v. *The State*, *supra* note 21 at 99.
34. *Ibid.*
35. *Nemichand* v. *Khemrai*, A.I.R. 1973 Raj. 240.
36. *Emperor* v. *Jhabbar Mal*, A.I.R. 1928 All. 222, 228.

VIII. Limitation

A complaint under section 500 of the Indian Penal Code, for defamation will be barred if filed three years after the commission of the offence.[37] Where, in a complaint under section 500, it is alleged that the defamatory matter was contained in a complaint under sections 406 and 420 of the Indian Penal Code, against the person now complaining of libel, the period of limitation for filing a complaint under section 500 of the code, would commence from the date of the complaint under sections 406 and 420 of the code and not from the date the complainant was finally acquitted of offences under sections 406 and 420. Section 469(1) of the Code of Criminal Procedure, 1973 specifically provides that the period of limitation prescribed in section 468, in relation to an offender, shall commence, *inter alia*, on the date of the offence. The exclusion of time for computing the period of limitation could not also be claimed under section 470 (1) of the Code of Criminal Procedure as it could not be said that the complainant was "prosecuting another prosecution."[38]

37. Ss. 469-470, Code of Criminal Procedure, 1973.
38. *Surinder Mohan Vikal* v. *Ascharj Lal Chopra*, A.I.R. 1978 S.C. 986.

CHAPTER 20

Newspapers and the Civil Law of Defamation

Introduction

RECENT CASES involving newspapers in the context of *civil* liability for defamation are not numerous. In such cases as have been reported, the publication of false, inaccurate or incomplete information has figured. In regard to civil liability for defamation, truth is a complete defence, unlike the position as regards criminal liability, where the accused must show not only that the information published was true, but also that its publication was for the public benefit.[1] Thus, many types of defamatory publication which were motivated by gain or published from malice or to satisfy curiosity, could not probably be justified in criminal law, but would escape civil liability if their truth can be established.

Position of Newspapers and Defences Available to Them

In cases where civil liability does arise (*i.e.*, where the allegations published are false, inaccurate or incomplete), the general principles of liability for defamation apply as much to newspapers as to others. Under these principles, the publication of a statement likely to harm the reputation of another attracts civil liability in damages, subject to specified defences. Truth, as stated above, is a complete defence for the purposes of civil liability. Besides this, the defences of absolute privilege, qualified privilege and fair comment on a matter of public interest are also available. The facts bringing a particular defence into existence have to be proved by the defendant.

Truth

The essential elements of various defences have been already dealt with under each head and it is not necessary to travel the same ground again. While discussing the position of newspapers in regard to truth, it is enough to state a few features of special importance for newspapers. In the first place, mere belief in the truth of an allegation is not enough.[2] This is so, even if the newspaper has published information collected from usually reliable sources. Even

---

1. S. 499, 1st exception of the Indian Penal Code. Compare s. 6 of the Libel Act, 1843 (U.K.).

2. See also *supra*, ch. 12.

an express statement (accompanying the publication of defamatory matter) that the report is based upon information derived from reliable sources does not give immunity, if the statement is untrue. This is because of the principle that the re-publication of libel is itself a tort. It is no defence that the libel originated elsewhere.

Secondly, if truth is pleaded as a defence, every material part of the statement must be proved to be true. This is the rule of common law, and presumably it would continue to apply in India, even though it has been partially modified in the United Kingdom by section 5 of the Defamation Act, 1952.

Reports of Judicial Proceedings

As to the situations covered by the defences of absolute privilege and qualified privilege, it is pertinent to mention here one aspect which is of special interest to newspapers. In India for the purpose of civil liability, the publication in a newspaper of a substantially true account of judicial proceedings enjoys only a qualified privilege, and not an absolute privilege, so that malice would take away the privilege. In the United Kingdom by statute[3] absolute privilege has been granted to newspaper reports of judicial proceedings. The point, of course, does not have much practical importance. Generally, in regard to newspaper reports of such proceedings, malice does not exist. Nor are there many reported Indian decisions where malice was alleged in this context.

Fair Comment

In the case of newspapers, the defence that becomes most relevant is that of fair comment. There is no tortious liability for publishing a fair comment on a matter of public interest. Originally, the right was recognised in cases of criticism of works of literature and arts.[4] But, in the middle of the last century, it has undergone great expansion.[5] What is, and what is not "fair", cannot be defined. In the case of any legal distinction, it is possible to find, on either side of the line of demarcation, cases so similar as to make it appear unjust to attempt to distinguish between them. But usually in such cases the question is not whether to draw the line, but where to draw it.

The word "fair", of course, does not here mean "justified or true". The comment made need not be the only or inevitable conclusion or inference to be drawn from the facts.[6] So long as it is a *comment*, (and not an allegation of fact), and is relevant to the subject matter commented upon and is honest, it is

---

3. The Law of Libel Amendment Act, 1888, as expanded by the Defamation Act, 1952.
4. *Dibdin* v. *Swan*, (1793) 1 Esp. 28 : 170 E.R. 269.
5. *Wason* v. *Walter*, (1869) L.R. 4 Q.B. 73, 93.
6. *Surajmal* v. *Horniman*, 20 Bom. L.R. 185, 196 (1918).

protected. It is unnecessary to discuss the decisions in detail, but a few typical Indian cases[7] show that the defence has been administered liberally by the courts in India.

Fact and Comment

Comment must be based on fact. This implies that the facts alleged must be true. It follows that any allegation of fact imputing an act of misconduct remains unprotected by the defence of fair comment, although, plea of truth can be taken if it can be proved to be true.[8] This is illustrated by a Calcutta case,[9] which held that imputing to a person the commission of a criminal offence does not fall within the range of "fair comment".

The comment, of course, must be relevant to the subject matter commented upon.[10] The epithet "fair" embraces the meaning of honest, and also the aspect of relevance. The view expressed must be honest and must be such as can fairly be called criticism.[11] Mere honesty of purpose would be of no avail if the words exceed the proper limits.[12]

Public Interest

The comment must relate to matters of public interest. In the very nature of things, there can be no definition of "matter of public interest". Such matters are numerous, and usually grouped under certain heads; but, generally speaking, they are matters which invite public attention, and which are open to public discussion or criticism.[13] The following instances, collected by Iyer[14] and based mostly on case law would be helpful for understanding the wide scope of "matters of public interest" :

(*i*) proceedings of public bodies;
(*ii*) proceedings of courts (subject to the law of contempt of court);
(*iii*) administration of government departments;
(*iv*) administration of public charities;
(*v*) administration of public companies;
(*vi*) proceedings of public meetings or local authorities;
(*vii*) published works;

7. *Nadirshaw* v. *Pirojshaw*, 15 Bom. L.R. 130 (1913); *Surajmal* v. *Horniman*, *ibid.*; *Union Benefit Guarantee Co.* v. *Thakorlal*, A.I.R. 1936 Bom. 114; *Lajpat Rai* v. *The Englishman*, I.L.R. 36 Cal. 883 (1909); *Subhash Chandra Bose* v. *R. Knight & Sons* A.I.R. 1929 Cal. 69; *Tushar Kanti Ghose* v. *Bina Bhowmick*, 57 Cal. W. N. 378 (1952-53).
8. *Nadirshaw* v. *Pirojshaw*, *id.* at 169.
9. *Barrow* v. *Lahiri*, I.L.R. 3 Cal. 495 (1908).
10. See Iyer, *Torts* 246, para 41 (1975).
11. *McQuire* v. *Western Morning News*, (1903) 2 K.B. 100, 109, 110 (Collins, M.R.).
12. *Union Benefit Guarantee Co.* v. *Thakorlal*, *supra* note 7 at 124.
13. *Mitha Rustomji* v. *Nusserwanji*, A.I.R. 1941 Bom. 278, 282.
14. *Supra* note 10 at 245-246, para 40.

(*viii*) advertisement of a new company, scheme or charity;

(*ix*) controversy carried on in the public press;

(*x*) character and qualifications—even the private life—of persons seeking a public office or position.

Of course, there is no definition in the books as to what is a matter of public interest. To quote Lord Denning's observations as to the scope of public interest :

> Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on ; or what may happen to them or others ; then it is a matter of public interest on which everyone is entitled to make fair comment.[16]

In theory, newspapers are subject to the same rules as other critics, and have no special right or privilege as such. But, in practice, they do enjoy considerable latitude so far as the defence of fair comment is concerned—a fact noted in a perceptive passage by Iyer.[17] This had been also noticed earlier by Lord Haldane in an *obiter dictum*.[18] In theory, the journalist's right to comment on matters of public interest is the same as that of an ordinary citizen, so that writers in newspapers have no special privilege of making unfair imputations or comments.[19] But, in practice, so far as allegations made against public men are concerned, the courts tend to be liberal and they seem to tolerate very strong attacks. "You cannot meet a whirlwind with a zephyr"—an observation of Darling, J.,[20] whose approach seems to have been followed in India also.[21] A Madras case[22] on the subject is usually cited on the point. The newspaper involved was the *Madras Times*. It had described the secretary of an association of railway workmen as "a mischievous agitator with overweening egotism misleading the men and fomenting a strike for selfish objects." The criticism was held to be within the limits of fair comment.

Apology

One more point to be noted is, that in India, only the common law defences are recognized, if one keeps aside the immunity conferred by specific constitutional or statutory provisions applicable for special purposes. There are no general defences created by statute as regards civil liability for defamation. For example, it is not a defence that the newspaper, on learning about

---

15. *Lyle-Samuel* v. *Odhams Ltd.*, (1920) 1 K.B. 135, 146 (Scrutton, L.J.).
16. *London Artists Ltd.* v. *Littler*, (1969) 2 All E.R. 193, 198 (C.A.).
17. *Supra* note 10 at 247, para 42.
18. *John Leng* v. *Langlands*, (1916) 114 L.T. 665, 667, referred to by Iyer, *ibid.*
19. *R.K. Karanjia* v. *K.M.D. Thackersey*. A.I.R. 1970 Bom. 424.
20. *Crossland* v. *Farrow Times*, Feb. 7, 1905. See Iyer, *supra* note 10 at 248, f.n. 12.
21. *Narayanan* v. *Mahendra Singh*, A.I.R. 1957 Nag. 19.
22. *Madras Times Ltd.* v. *Rogers*, 30 M.L.J. 294.

the fact that the statement is defamatory, subsequently published an apology. Publication of an apology may be a ground in mitigation of damages, but does not confer any immunity from liability as such. The position in the United Kingdom in this regard is somewhat different. By the Libel Act, 1843, the defence of *apology* was introduced for a libel contained in a *public newspaper* or other periodical publication. The scope of this protection was extended to *any mode of publication* by the Defamation Act, 1952, whereunder any person may make an offer of amends if he claims that the alleged defamatory words were published by him innocently. It is needless to repeat that in the absence of such legislation in India, apology is not a defence as such.[23]

Criminal and Civil Remedy

The fact that a person has accepted an apology and withdrawn a criminal prosecution for defamation does not bar a civil suit by that person for defamation.[24]

Damage

Certain points relevant to the assessment of damages for defamation may now be mentioned. Broadly speaking, the amount of damages to be awarded for defamation will depend on—

(*a*) the nature of the imputation,
(*b*) rank and social position of the parties,
(*c*) circumstances of publication,
(*d*) language in which the imputation is couched,
(*e*) form and manner of publication,
(*f*) conduct of the parties before litigation,
(*g*) conduct during litigation.

Figures of Damages : Case Law of the Twenties

Of all these circumstances, one that needs special mention in the context of newspapers is the form and manner of publication. Excessive publication may take away a privilege otherwise available. This, of course, is a general principle. What is material right now is the issue whether the fact that the publication is *in a newspaper* is itself an aggravating factor in assessing damages. In theory,[25] a libel in a newspaper, especially one with a very large circulation, is ordinarily a greater wrong than a libel published to a few

---

23. *Narayanan* v. *Mahendra Singh*, *supra* note 21.
24. *Govinda Charyulu* v. *Seshagiri Rao*, A.I.R. 1941 Mad. 860; *Narayanan* v. *Mahendra Singh*, *ibid.*
25. *Madras Times* v. *Rogers*, *supra* note 22.

persons.[26] And, in some of the earlier Indian libel cases, the figures of damages awarded *against newspapers* seem to be by no means substantial. Some sample figures taken from reported decisions of the twenties of the present century may be mentioned here :

(*a*) Rs. 200, in a Bombay case ;[27]
(*b*) Rs. 1,500, in a Calcutta case ;[28]
(*c*) Rs. 1,000, in another Calcutta case ;[29]
(*d*) Rs. 2,000, in another Calcutta case ;[30]
(*e*) Rs. 6,000, in a Madras case. [31]

Figures of Damages in Later Cases

When one comes to the case law in the thirties to the fifties of the present century, the sums awarded as damages against newspapers become still lower looking to the fall in the value of the rupee. Here are a few cases selected at random :

(*a*) Rs. 2,250, awarded in a Lahore case.[32] (The High Court described this sum as "substantial").

(*b*) Rs. 1,000 in a Nagpur case.[33] (It is not clear if it was a newspaper case). [The libel charged a sub-inspector of police with the rape of a girl in his custody].

(*c*) Rs. 100 awarded in a Madras case.[34] (The person libelled was a lawyer, and a popular member of society).

At this stage, it would be of interest to refer to a Bombay case that was decided in 1970 and attracted much attention.[35] The person libelled by the newspaper was a prominent businessman and industrialist. He claimed Rs. 3,00,000 as damages, but was ultimately awarded Rs. 1,50,000.

Conclusion as to Damages

On the whole, it seems that damages awarded against newspapers in recent years have been even more conservative than the amount awarded in the twenties and the thirties. The case mentioned in the preceding paragraph may be regarded as explained.

26. *Gathercole* v. *Miall*, (1846) 15 M & W 319, 324 : 153 E.R. 872, 874.
27. *Nadirshaw* v. *Pirojshaw*, *supra* note 7.
28. *The Englishman* v. *Lajpat Rai*, I.L.R. 37 Cal. 760 (1910).
29. *Subhash Chandra Bose* v. *Knight & Sons*, *supra* note 7.
30. *Irwin* v. *Reid*, I.L.R. 48 Cal. 304 (1921).
31. *Subramania* v. *Hitchcock*, A.I.R 1925 Mad. 950.
32. *Munshi Ram* v. *Mela Ram*, A.I.R. 1936 Lah. 23, 36.
33. *Narayanan* v. *Mahendra Singh*, *supra* note 21.
34. *Narayanan* v. *Narayana*, A.I R. 1961 Mad. 254.
35. *R.K. Karanjia* v. *K.M.D. Thackersey*, *supra* note 19.

Appendix I

Indian Case Law on Slander[1]

IMPORTANT DECISIONS as to how far slander is actionable in India without special damage are noted below :

Allahabad

Dewan Singh v. *Mahip Singh.*[2] (*Mufassil*)

Abusive language was held actionable *without special damage, unless excused or protected by other rule of law and a civil injury apart from defamation*, in India. But it was also observed that the English law of slander drawing an arbitrary distinction was not applicable in India.

Harak Chand v. *Ganga Prasad Rai.*[3] (*Mufassil*)

The true test of spoken actionable words is their tendency to excite feelings of hatred, contempt, ridicule, fear, dislike or disesteem, due regard being had to the circumstances in which the language was used.

(Point of special damage not decided, though some cases on the point are referred to).

Sagar Ram v, *Babu Ram.*[4] (*Mufassil*)

Language implying moral misconduct held actionable without proof of substantial loss.

Rahim Bakhsh v. *Bachcha Lall.*[5] (*Mufassil*)

Allegation that B's firm was the most dishonest in the city held actionable without special damage.

---

1. Only selected cases dealing with the actionability of slander, with or without special damage, are dealt with.
2. I.L.R. 10 All. 425, 456 (1888) (Mahmood, J.).
3. I.L.R. 47 All. 391 (1924) : A.I.R. 1925 All. 371 (Lindsay & Kanhaiya Lal JJ.).
4. (1904) 1 All. L.J. 102, cited in *supra* note 3 at 400.
5. A.I.R. 1929 All. 214.

Suraj Narain v. *Sita Ram*.[6]

Following *Rahim Bakhsh* v. *Bachcha Lall*,[7] it was held that abusive and insulting language was actionable without special damage, though there was no injury to character.

Bombay

Hirabai v. *Dinshaw*[8] (Original side)

Though Parsis are governed by the common law, yet words *imputing* adultery to Parsi married women are actionable *without special damage*, as adultery is an offence under the Indian Penal Code. This case is important, because, though actually, in the circumstances of the case, slander was held to be actionable without special damage, yet, the court did lay down the general proposition that the English *rule* as to non-actionability of slander without special damage *applies to Parsis*. It was held that in an action for slander, the law to be applied to Parsis, *in the town and island of Bombay*, is the English common law so far as the circumstances of the place and of inhabitants admit. Since adultery was a crime, the court took the view that the English judges would not apply the general rule as to slander in cases where adultery was a crime.[9] The origin of the English rule on the subject was attributed by Marten, C.J. to "commonsense".[10] The history of the provisions as to the law applicable in the High Courts on the original side was also traced in detail.[11]

A point of law reform was also made by Marten, C.J. He pointed out that this decision did not affect those cases of slander of women, where the crime of adultery was not involved :

> and that *it may well be a matter for consideration by the Indian Legislature as to whether an Act on the lines of the Slander of Women Act, 1891, should not be passed for the better protection of women and girls in India against imputations on their chastity*.[12]

Calcutta

Girish Chunder Mitter v. *Jatadhari Sadukhan*.[13]

Mere use of abusive and insulting language (like *sala*, *etc.*) *apart from*

6. A.I.R. 1939 All. 461 (Mohammad Ismail, J.).
7. *Supra* note 5.
8. 28 Bom. L.R. 391; A.I.R. 1927 Bom 22; I.L.R. 51 Bom. 167 (1926) (Sir Amberson Marten, C.J., and Kemp, J.).
9. *Id.* at 182.
10. *Id.* at 179.
11. *Id.* at 171 to 173.
12. *Id.* at 184 (emphasis added).
13. (1899) I.L.R. 26 Cal. 653 (F.B.) (Maclean, C.J., Mepherson, Hill, Jenkins, JJ.) (C.M. Ghose, J., dissenting).

defamation, is not actionable irrespective of special damage.

Bhooni Money Dossee v. *Natobar Biswas.*[14] (Case from town of Calcutta).

Action for damages for false and malicious slanderous words imputing unchastity to plaintiff (Hindu married woman) dismissed, *as no special damage was pleaded or proved.*

Girwar Singh v. *Siraman Singh.*[15] (*Mufassil*)

It was held a that suit for damages for slander will not lie in a civil court at the instance of a person about whose sister the allegation was made that she was in the keeping of X, as the words complained of were neither defamatory *of him* (the plaintiff) nor had they caused *him injury.*

Sukhan Teli v. *Bipal Teli.*[16] (*Mufassil*)

Slander is actionable without special damage.

H.C. D'Silva v. *E.M. Potengar.*[17]

Imputation of "bastard" held actionable without proof of special damage. Categorical proposition laid down (dissenting from *Bhooni Money* [17a]) that the English rule did not apply in India.

Lahore

Girdhari Lal v. *Panjab Singh.*[18] (*Mufassil*)

(*i*) A statement calling another person an "outcaste" is not actionable without special damage. That certain words are not actionable in themselves, is a part of the law of India also (articles 24 and 25, Limitation Act, 1908 referred to).

(*ii*) Apart from that, mere abusive and insulting language is not actionable without such damage.

Lucknow (Oudh)

Gaya Din Singh v. *Mahabir Singh.*[19] (*Mufassil*)

The rule of English law prohibiting action for damages for oral defamation

14. (1901) I.L.R. 28 Cal. 452 (Harington, J.). Dissented from in *H.C. D'Silva* v. *E.M. Potengar*, I.L.R. (1946) 1 Cal. 157.
15. I.L.R. 32 Cal. 1060 (1905) (Harington and Mookerjee, JJ.).
16. I.L.R. 34 Cal. 48 (1906).
17. I.L.R. 1 Cal. 157, 167, 168 (1946) (Gentle, J.).
17a. *Supra* note 14.
18. A.I.R. 1933 Lah. 727 (Addison, J.).
19. A.I.R. 1926 Oudh 363, I.L.R. (1926) 1 Luck. 386 (Sir Louis Stuart, C.J., and G.N. Misra, J.).

without special damage does not apply in India. (Allegation was that the plaintiff, a high caste Thakur, had married an Ahir daughter).

Madras

Parvati v. *Mannar*.[20]

Defendant abused the plaintiff, saying that she (the plaintiff) was not the legally married wife of her "husband" and was unchaste. This was held to be actionable without special damage.

Vallabha v. *Madusudanan*.[21]

In this case, a caste enquiry was held on a suspicion of the commission of adultery by a Nambudri woman. She confessed that the plaintiff had illicit intercourse with her. Both of them were declared outcastes, but the plaintiff was not heard in the inquiry. Plaintiff sued for damages for defamation against those who had declared him an outcaste. It was held that the declaration that the plaintiff was an outcaste was illegal and that the defendants had not acted *bona fide* in making the declaration and that the plaintiff was entitled to recover damages.

Leslie Rogers v. *Hajee Fakir Muhammad Sait*.[22]

In this case, the decision in *Parvati* v. *Mannar*,[23] was noted, apparently, with approval, because the court (Wallis, C.J.) observed :

> Taking it then to be defamatory to say that a person is suspected of having committed an offence. I think the person against whom the offence is alleged to have been committed must have a qualified privilege to discuss the case mentioning his suspicion. . . .[24]

Subbaraidu v. *Sreenivasa Charyulu*.[25]

Plaintiff and defendent were rival candidates at an election. Plaintiff called the defendant "rowdy suspect" at an election meeting. Defendant retorted that plaintiff was a drunkard and repeated this after the meeting.

Held (*i*) allegation at the meeting enjoyed qualified privilege, but

(*ii*) its repetition afterwards was actionable.

---

20. I.L.R. 8 Mad. 175 (1884).
21. I.L.R. 12 Mad. 495 (1889) (Collins, C.J., and Muttusami Ayyar, J.).
22. 35 M.L.J. 673 (1918).
23. *Supra* note 20.
24. *Supra* note 22 at 676-77.
25. 52 M.L.J. 87 (1926); A.I.R. 1927 Mad. 329 (Devadass, J.).

Narayana Sah v. *Kannamma Bai*.[26] (Original side)

It was held that a suit for defamation in respect of words imputing unchastity was maintainable by a Hindu woman on the original side of the Madras High Court without special damage. (History of the provisions regarding law to be applied, traced from 1687).

26. A.I.R. 1932 Mad. 445 (Beasley, C.J., and Cornish, J.).

Appendix II

Section 468, Code of Criminal Procedure, 1973

(1) EXCEPT AS otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be—

(*a*) six months, if the offence is punishable with fine only ;

(*b*) one year, if the offence is punishable with imprisonment for a term not exceeding one year ;

(*c*) three years, if the offence is punishable with imprisonment for a term exceeding three years.

Appendix III

Sections 499-502 I.P.C.

Chapter XXI

Of Defamation

WHOEVER BY words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

(*a*) A says—"Z is an honest man; he never stole B's watch"; intending to cause it to be believed that Z did steal B's watch. This is defamation unless it falls within one of the exceptions.

(*b*) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

(*c*) A draws a picture of Z running away with B's watch intending it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

First Exception.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations

(*a*) A says— "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest". A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(*b*) But if A says—"I do not believe what Z asserted at that trial because I know him to be a man without veracity"; A is not within this exception, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public

expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

(*a*) A person who publishes a book, submits that book to the judgment of the public.

(*b*) A person who makes a speech in public, submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(*d*) A says of a book published by Z—"Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind". A is within the exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(*e*) But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine." A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a school-master whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception.

Ninth Exception.—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the

protection of the interests of the person making it, or of any other person, or for the public good.

Illustrations

(*a*) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(*b*) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

501. Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend two years, or with fine, or with both.

Chapter XXII

Of Criminal Intimidation, Insult and Annoyance

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Appendix IV

Recommendations of the Press Council on Law of Defamation

1. *Libel and slander* : The distinction between libel and slander, recognised in English law but rejected by most of the courts in India, should be specifically abolished in India, and the law on the subject settled, by providing that "Words spoken and published shall not require special damage to render them actionable."

2. *Privacy* : Section 13(1)(*c*) of the Press Council Act, 1978 should be amended by adding, after the words "the maintenance of high standards of public taste", the words "including respect for privacy".

(*Explanatory note* : The Second Press Commission in its report, while not inclined to recommend any general law regarding privacy, recommended that the Press Council Act should be amended by adding the words "including respect for privacy".[1] The Press Council agrees with the need to amend the Press Council Act.)

3. *Spouses (criminal and civil law)* : Statements made by one person to his or her spouse should enjoy absolute privilege in regard to liability for defamation, (civil as well as criminal).[2]

(*Explanatory note* : This is necessary to protect marital confidences with great sanctity. The real basis for recognising such a privilege is not the supposed doctrine of "identity of personality of the spouses", but the need to protect family confidences. A defamatory statement made by one spouse to the other (as distinct from a statement made to the *spouse* of the plaintiff) cannot be the subject of an action and "it is an instance of absolute privilege, the reason for which is the highly confidential character of the relationship".[3]

There is, therefore, need to amplify section 499 of the Indian Penal Code, by inserting an additional exception on the subject. The point is valid for civil liability also, for which specific provision may be made by suitable legislation).

---

1. *Report of the Second Press Commission*, vol. I, ch. 6, pp. 67-77, particularly paras 41-44 (1982).
2. *M.C. Verghese* v. *T.J. Poonan*, (1969) 1 S.C.C. 37, 40
3. Salmond and Heuston, *Torts* 154-155, para 56(6); (1981); also Prosser, *Torts* 785

4. *Joint responsibility* : See *infra*, paragraph 5 (Innocent dissemination).

DEFENCES

5. *Innocent dissemination* : The defence of "innocent dissemination" should be (*i*) recognised for distributors of alleged defamatory matter; and (*ii*) extended to printers; (*iii*) as also to translators, including newspaper employees. But the protection need not be given to publishers of offending matter in translation. A person who makes a translation (orally or in writing) should be protected by qualified privilege, provided that the words complained of have been translated in accordance with the sense and substance of the original. The privilege should be available also to a newspaper employee making such a translation.

Suggested draft for distributors is as follows :

A person who is a distributor of a publication containing defamatory matter shall not be liable in tort for defamation merely on the ground that he distributed such matter, if, having taken all reasonable care, he did not, at the time of distribution, know that the publication contained such matter and had no reason to believe that it was likely to do so.

Suggested draft regarding translators is as follows :

A person who is a professional translator shall not be liable in tort for defamation, merely on the ground that he translated defamatory matter, provided the translation is in conformity with the sense and substance of the original.

Explanation : The expression "professional translator" includes an employee of a newspaper establishment.

(*Explanatory note* : (*a*) Under the present law, every person who takes part in the publication of a libel is *prima facie* liable for it.[4] Thus, for example, where an article containing a libel is published in a newspaper, the following persons are *prima facie* liable (in a civil action) :

(*i*) the writer of the article;

(*ii*) the proprietors[5] of the newspaper : They will be liable as participants in the publication. They are likely also to be liable

---

4. 28 *Halsbury's Laws of England* 17, 19, 35, para 32, 38, 65. (4th ed. 1979). See also Duncan & Neill, *Defamation* 41, paras 8, 12 and f.n. 1 (1978).

5. *Munshi Ram* v. *Mela Ram*, A.I.R. 1936 Lah. 23, 26 (knowledge of publication not required) (Proprietor of *Bharat*, an Urdu newspaper).

vicariously, as the employers of the editor and the journalist concerned;

(*iii*) the editor;

(*iv*) the printers; and

(*v*) subject to the defence of innocent dissemination, persons such as newspaper vendors who sell the newspaper to the public.

(*b*) The Second Press Commission stated the existing position regarding joint responsibility for the publication of a defamatory statement, as under :

82. Under the existing law, where an action for defamation is brought in respect of a joint publication of a libel, malice on the part of any one of the persons jointly responsible for such publication is sufficient to defeat the plea of 'fair comment' or 'qualified privilege' so as to render all the defendants jointly liable to the plaintiff. The presence of malice on the part of one defendant renders the whole of the damage recoverable from a co-defendant who may himself be wholly innocent of malice. We think the following statement of law on the point by Gatley is most appropriate :

> Where a person has published defamatory words on an occasion of qualified privilege the privilege will only be defeated so far as he is concerned if he himself is malicious, or if he is liable on the basis of respondent superior for the malice of a servant or agent.[6]

(*c*) The Second Press Commission then analysed "the impact of this principle in our law", as under :

(*i*) A publisher of a newspaper will continue to be vicariously responsible for the malice of his agent.

(*ii*) A publisher of a newspaper will not be vicariously responsible for the malice of an independent contractor.

(*iii*) A publisher of a newspaper will not be vicariously liable for the malice of an unsolicited correspondent, whether anonymous or otherwise.

(*d*) It may be mentioned that under the defence of innocent dissemination, (which is non-statutory in character), distributors of a libel are protected, if they can prove that[7]—

---

6. *Supra* note 1 at 48, para 82.
7. *Emmens* v. *Pottle*, 16 Q.B.D. 354 (1885) : *Vizetelly* v. *Mudie's Select Library*, (1900) 2 Q.B. 170.

(*i*) they did not know that the book or paper contained the libel complained of; or

(*ii*) they did not know that the book or paper was of a character likely to contain a libel; and

(*iii*) such want of knowledge was not due to any negligence.[8]

(*e*) The Faulks Committee in the United Kingdom[9] went into the question of the liability of distributors, printers and translators of written publications. The committee had noted that distributors of written publications (for example, booksellers, news agents and news vendors) enjoy the special defence of "innocent dissemination", which is not available to the *first or main publishers* of a work. It had recommended the extension of the defence of innocent dissemination *to printers*, subject to the same or similar conditions and safeguards as in the case of distributors.

(*f*) The Faulks Committee had noted that the effect of this recommendation would be that printers who, in the normal course of their business of everyday printing, print written publications will have a defence. But where they are put on enquiry as to the potentially defamatory character of the work complained of, or are in any way negligent in failing to enquire (about the defamatory character) in relation to any given work, they would continue to be liable. In fact, the committee added that if the experience of distributors is any guide, the recommendation, if accepted, would ensure that printers are normally not joined as defendants.

(*g*) As regards translators, the Faulks Committee recommended[10] the enactment of the following clause, providing for a defence which "would be equivalent in nature to qualified privilege" :

> Publication by any person of a translation made by him (whether oral or written) shall be protected by qualified privilege provided that the words complained of have been translated in accordance with the sense and substance of the original.

(*h*) Having noted the recommendation of the Faulks Committee (summarised above), the Second Press Commission in India recorded the following conclusion on the subject :

> We suggest that the recommendations of the Faulks Committee with regard to the liability of distributors (*sic*) and printers be incorporated in our law. As regards translation, we are of the view that protection

8. *Faulks Committee, Report*, Cmd. 5905, p. 81, para 294 (1975).
9. *Id.* at 81-85, para 293-315.
10. *Id.* at 84-85, para 311-312.

should be given to the translator, *but not to* the publication of offending matter in translation.[11]

(*i*) The suggestion made by the Second Press Commission should be implemented.

6. *Multiple publication* : Liability for the multiple publication of defamatory matter should be limited by enacting a suitable provision which will bar successive legal proceedings for multiple publication except in certain cases. The provision could be somewhat on the following lines :

Where, in respect of a defamation, proceedings instituted by a person have been concluded either by settlement, judgment, or final order at a trial or by discontinuance, the plaintiff shall not be permitted to bring or continue any proceedings against the defendant in respect of the same or any other publication of the same matter, except with the leave of the court and on notice to the defendant.

(*Explanatory note* : On multiple publication, the Second Press Commission endorsed the following recommendations made by the Australian Law Reforms Commission :

The rule as to separate publication should be abrogated and a single publication rule adopted. The multiple *publication of particular* material should give rise to one cause of action only but, in such an action, the plaintiff should have relief appropriate to all publications. This rule could, however, give rise to unsatisfactory results where a plaintiff was unaware of the extent of the multiple publications and, therefore, did not seek appropriate remedies. The suggestion of allowing the court a discretion to permit the plaintiff to bring further proceedings in respect of the same matter is a flexible approach, but it may result in uncertainty. Even after an action is determined, a defendant may be in doubt whether further proceedings may be brought against him. The position of a plaintiff who discovers that a publication received wider coverage than was first apparent is not entirely clear. Certainty is important to the parties. Moreover, it is desirable that the courts have full information as to the extent of publication in determining relief in the first action. The defendant is likely to know the extent of publication; he should be encouraged to disclose it. *Accordingly, the plaintiff should be limited to a single action in respect of a multiple publication, but only to the extent disclosed in the action.* The plaintiff will have a separate right of action in respect of any additional publication. This will automatically cover any further publication after the first trial, as well as any publication which the defendant failed to admit. The provision will leave no doubt as to the rights of the

11. *Supra* note 1 at 48, para 83, last sub-paragraph.

parties. A defendant who makes full disclosure will be liable, if at all, for the multiple publication once for all. A plaintiff who discovers undisclosed material is certain that the court will entertain his action.[12]

The recommendation of the Faulks Committee (in the United Kingdom) on the subject was as under :

> Where proceedings by a person in respect of a defamation have been concluded either by settlement, judgment or final order at a trial or by discontinuance, the plaintiff should not be permitted to bring or continue any proceedings against the defendant in that action in respect of the same or any other publication of the same matter, except with the leave of the court and on notice to defendant.[13]

Such a reform of the law as recommended by Faulks Committee on the subject is eminently sensible, and is worth adopting in India.)

7. *Unintentional defamation* : For "unintentional defamation" (*i.e.* a statement which was not intended to defame the plaintiff, but which turns out to be defamatory by reason of facts not known to the maker of the statement) there should be no liability. Such a provision should be enacted in our law. In drafting it, assistance can be drawn from section 4 of the Defamation Act, 1952 (U.K.). Section 4, in brief, renders immune a person who has published words alleged to be defamatory of another person, if he proves that the words were published by him innocently in relation to that other person and if he has made an "offer of amends", as provided in the section.

(*Explanatory note* : By "unintentional defamation" is meant a statement which, though it may actually harm the plaintiff's reputation, was not intended to harm it, nor even known to be likely to do so. A series of English judicial decisions had led to a very anomalous situation in this regard. A person could be liable in tort for defamation, even though he did not know of the existence of the plaintiff. The injustice of this position had been realised for long.

Section 4 of the Defamation Act, 1952 relating to unintentional defamation now deals with the subject.

The section is worth adopting in India.

It should be mentioned that there is a Madras case[14] which does not follow the common law rule relating to unintentional defamation. The appellant in

---

12. *Id.* at 47-48 (emphasis added).
13. *Supra* note 8 at 80, paras 289-291.
14. *T.V. Ramasubba* v. *A.M. Ahmed Mohideen*, A.I.R. 1972 Mad. 398, 405, paras 10-13.

that case published in his newspaper a news-item charging a person (the respondent) with smuggling. The respondent alleged that the news-item referred to him, and was defamatory of him. The lower court awarded damages against the appellant on the basis of the House of Lords decision of 1910.[15]

It was, however, held by the Madras High Court that the rule laid down by the majority of the House of Lords in the judgment mentioned above is not applicable in this country.

As it had been proved that the appellant, when he published the news-item, did not know of the existence of the respondent and he had, later on, also published a correction in his paper (that the item did not refer to the respondent), the appellant should not be made liable for damages.

There were two earlier rulings[16] taking the same view, which the High Court followed in the above case.

It is not, however, certain whether other High Courts will take the same view. Hence an express provision would be useful).

8. *Truth as a defence to civil action for defamation* : As regards civil liability, the truth of a defamatory statement should give immunity from liability (as at present), and it is not necessary to further insist in "public good".

As regards criminal liability, both truth and public good should be proved, as at present.

(*Explanatory note* : The Second Press Commission rejected the suggestion that truth should not be a complete defence unless accompanied by public interest.[17] The Press Council agrees with this approach.

As regards criminal liability, mere truth should not be a defence and "public good" should also be required, as at present).

9. *Partial justification* : A provision similar to section 5 of the Defamation Act, 1952 (U.K.), to confer protection on a statement which is true in part, may be enacted. (Section 5 is quoted in the explanatory note below).

(*Explanatory note* : At common law, the defence of "justification" suffered from one drawback, in that, a person taking this defence had to prove

15. *Hulton* v. *Jones*, (1910) H.L. 20.

16. *Naganatha Sastri* v. *Subramania Iyer*, A.I.R. 1918 Mad. 700; *Secretary of State* v. *Rukhminibai*, A.I.R. 1937 Nag. 354.

17. *Supra* note 1 at 46, para 77.

the truth of the *whole libel i.e.*, of every defamatory statement contained in the words complained of. He remains liable to pay damages in respect of the part not justified, if that part is defamatory and materially injures the reputation of the plaintiff. This is the position if no other defence is established.[18] The Porter Committee in the United Kingdom recommended that in a defence of justification (truth), the defendant should be entitled to succeed if he proves that so substantial a portion of the defamatory allegation is true as to lead the court to the view that any remaining allegations which had not been proved to be true did not add appreciably to the injury to the reputation of the plaintiff. Section 5 of the Defamation Act, 1952 now provides as under :

> *Justification*—In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges.

A similar provision should be adopted in India.)

10. *Fair Comment* : The defence of "fair comment" (honest comment on a matter of public interest) should be available, if the comment is "fair" (honest), having regard to such of the factual allegations on which the comment is based as are proved to be true, *even if the other factual allegations made are not* proved. For framing the necessary provision, section 6 of the Defamation Act, 1952 may be drawn upon. (The section is quoted in the explanatory note below).

(*Explanatory note* : (*a*) A criticism generally made in the United Kingdom of the defence of fair comment was that the defence was unduly technical. The defence was available only in respect of expressions of opinion, and the portions of the statements that were in the nature of "assertions of facts" had to be proved strictly. In other words, the law envisaged a strict compartmentalisation between "facts" and "opinions". Now, normally, defamatory matter would not consist solely of expressions of opinion. Facts and expressions of opinions would be mixed up. Hence a strict adherence to the rule caused injustice. The Porter Committee noted this defect, and recommended[19] that the basis of the defence of fair comment should be broadened in a manner similar to that recommended by that committee in relation to the defence of justification.[20]

---

18. *Halsbury's Laws of England*, *supra* note 4 at 44-45, para 87.
19. *Porter Committee Report*, para 83-91, and Summary of Recommendations (No. 6).
20. *Supra*, para 9.

(*b*) Section 6 of the Defamation Act, 1952 now provides as under :

Fair Comment : In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved, if the expression of opinion is fair comment, having regard to such of the facts alleged or referred to in the words complained of as are proved.

A similar provision should be enacted in India.)

11. *Reports in newspapers of certain proceedings* : In regard to newspaper reports of certain proceedings, immunity from liability is conferred by section 7(1) to 7(5) of the Defamation Act, 1952 (read with the relevant schedule). That provision should be adopted in the Indian law with necessary adaptations, subject to an important exception for the situation dealt with in the explanatory note below, under "Exception".

(*Explanatory note* : In the United Kingdom, substantially implementing the recommendatons made by the Porter Committee on Defamation (1948), the Defamation Act, 1952 expands the qualified privilege available in respect of reports of certain proceedings in newspapers. The relevant provisions are contained in section 7(1) to 7(4) (read with the schedule to the Act), which enumerate the proceedings for which qualified privilege is available, and in section 7(5) of the Act which incorporates a definition of "newspaper" that is wider than the earlier law. The qualified privilege is a wide one in respect of reports listed in part I of the schedule to the Act, in the sense that these reports are privileged without the need for explanation or contradiction. The qualified privilege, however, is subject to an explanation or contradiction in the case of reports enumerated in part II of the schedule to the Act.

These provisions may be adopted in India, subject to the exception indicated below.

Exception :

(*i*) However, any privilege to be conferred in regard to defamation should not be construed as conferring also a privilege to publish *indecent* matter. This should be made clear, while drafting the relevant provision.

(*ii*) There is also need to exclude, from such protection, matter the publication of which might *constitute an offence against religion* under the Indian Penal Code. This would correspond to "blasphemous" matter, excluded from the English provision.[21]

---

21. S. 3 of the Law of Libel Amendment Act, 1888 (Eng.)

Punishment, Jurisdiction and Procedure

12. *Survival of cause of action for defamation* : Causes of action for defamation should survive after the death of the person wronged or wrong-doer. Section 306 of the Indian Succession Act, 1925 should be amended for the purpose. (The section is quoted in the explanatory note below.)

(*Explanatory note* : There are certain anomalies in the present Indian law as to the survival of causes of action for defamation after the death of the person wronged or of the wrong-doer. Section 306 of the Indian Succession Act, 1925 (omitting the illustration) reads as under :

> All demands whatsoever and all right to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of his decease, survive to and against his executors or administraiors, except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

Section 306 of the Indian Succession Act reminds one of the maxim-personal action dies with the person. Although somewhat obscure in its origin, the principle that a personal cause of action dies with the persons seems to have been linked with the *criminal flavour* of early tort remedies.[22] The maxim was originally introduced to prevent *action of a penal character* like trespass and its offshoots, from being brought after the death.

Application of the doctrine to defamation is an anomaly. Section 306 of the Succession Act should, therefore, be amended so as to allow survival of causes of a action for defamation, even after death.

It may incidentally, be mentioned that in Kerala, section 306 of the Succession Act in so far as it relates to actions in tort[23] has been abrogated).

13. *Punishment for defamation* : (*a*) Under section 500 of the Indian Penal Code, the punishment for defamation should be *simple* imprisonment upto two years, or fine or both. It was recommended by the Law Commission of India that the punishment should be imprisonment of *either description* for two years or fine or both.[24] The Press Council does not agree with this recommendation.

---

22. Fleminig, *Torts* 695 (1965).
23. Kerala Torts (Miscellaneous Provisions) Act 1976 (8 of 1977) ; see 1977 K.L.T. (*Journal*) 37, 39.
24. Law Commission of India, *42nd Report* (*Indian Penal Code*) 331, para 21.5 (June 1971).

(*b*) However, as recommended by the Law Commission, where the defamatory statement has been published in a newspaper, the convicting court should have power to direct that the judgment (or a part thereof) shall be published in such newspaper as the court may specify, the cost of publication to be be recovered from the convicted person. The Second Press Commission also expressed its agreement with this recommendation of the Law Commission.[25] The recommendation of the Law Commission (except as to the nature of imprisonment) deserves implementation.

14. *Jurisdiction and procedure* : (*a*) In regard to summoning (in court) persons accused of defamation, the Second Press Commission, recommended a suitable amendment of section 205(1) of the Code of Criminal Procedure, 1973 so as to provide that where the person accused of defamation is an editor, publisher or proprietor of a newspaper or periodical, the magistrate should dispense with the personal attendance of the accused, unless there is a *prima facie* case of malice.[26] However, there will be no interference with the wide discretion conferred by section 205(2) of the code on the magistrate to direct personal appearance of the accused at any subsequent stage of the proceedings or to dispence with his personal appearance at any stage.

The above recommendations should be implemented. Further, the same approach should be adopted in regard to writers (in newspapers or periodicals) and reporters (of newspapers or periodicals).

15. *Limitation* : Under section 468 of the Code of Criminal Procedure 1973, the period of limitation for a prosecution for defamation is three years. The period should be reduced to one year in the case of defamation committed by printed work.

16. *Radio and Television* : The above recommendations are intended to apply to matters broadcast on the radio and television also.

25. *Supra* note 1 at 44-45, para 73.
26 *Id.* at 47, para 80.

Subject Index